

KF
801

A86

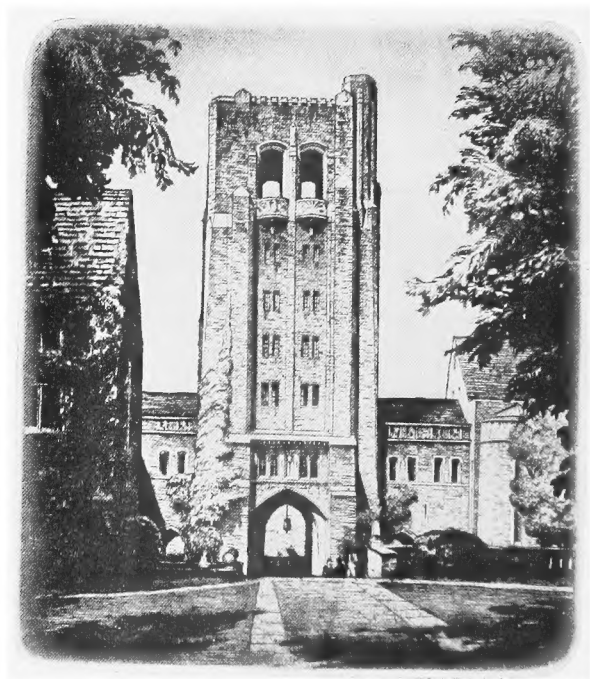
1897

Cornelliana

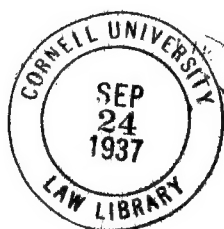
CORNELL UNIVERSITY LIBRARY

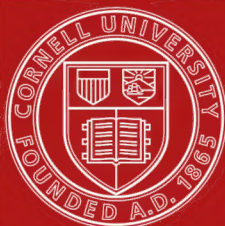


3 1924 052 854 910



Cornell Law School Library





Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

PRINCIPLES
OF THE
ENGLISH LAW OF CONTRACT
AND OF
AGENCY IN ITS RELATION TO CONTRACT



PRINCIPLES
OF THE
ENGLISH LAW OF CONTRACT
AND OF
AGENCY IN ITS RELATION TO CONTRACT

BY
eynell
SIR WILLIAM R. ANSON, BART., D.C.L.
OF THE INNER TEMPLE, BARRISTER-AT-LAW
WARDEN OF ALL SOULS COLLEGE, OXFORD

Eighth Edition

FIRST AMERICAN COPYRIGHT EDITION

EDITED WITH AMERICAN NOTES

BY

ERNEST W. HUFFCUT

PROFESSOR OF LAW IN THE CORNELL UNIVERSITY SCHOOL OF LAW.

NEW YORK AND ALBANY
BANKS & BROS., LAW PUBLISHERS
1897

All rights reserved

B4/331, c.1

COPYRIGHT, 1895,
BY MACMILLAN AND CO.

Press of J. J. Little & Co.
Astor Place, New York, U. S. A.



NOTE TO THE AMERICAN EDITION.

THE object of this authorized American edition of Sir William Anson's well-known treatise, is to give parallel references to selected American authorities where the American law corresponds with the English law as stated by the author, and to indicate clearly the points at which the American authorities either disagree wholly with the English law, or are strongly divided among themselves. No attempt at exhaustive citation of authorities has been made. The simplicity and conciseness of the author's treatment would be marred by a large citation of cases, and the book would be to that extent less useful to the student. If the editor's citations exceed in amount those of the author, it is only because the American law is the law of upwards of fifty jurisdictions, while the English law is the law of but one.

The abbreviation, "H. & W.," following the citation of cases, refers to "Huffcut and Woodruff's American Cases on Contract," a volume prepared especially to accompany Sir William Anson's text.

Statutory changes have generally been indicated by references to Stimson's American Statute Law, a work of great service to American students and practitioners.

It is hoped that this edition may serve to increase the usefulness of a book which is already the universally acknowledged model of what a student's book should be.

E. W. H.

CORNELL UNIVERSITY, SCHOOL OF LAW,
October, 1895.

PREFACE TO THE SIXTH EDITION.

WHEN the subject of Contract was first introduced into the School of Jurisprudence at Oxford, in the year 1877, teachers of Law had to consider the books which their pupils might best be directed to read. Some works on the subject of acknowledged value to the practising lawyer were hardly suitable for beginners, and the choice seemed to lie between the works of Mr. Leake, Sir Frederick Pollock, and the late Mr. Smith. Of these, Mr. Smith alone wrote expressly for students, and I had, as a student, read his book with interest and advantage. But I thought that it left room for an elementary treatise worked out upon different lines.

Neither Sir Frederick Pollock nor Mr. Leake wrote for beginners, and I feared lest the mass of statement and illustration which their books contain, ordered and luminous though it be, might tend to oppress and dishearten the student entering upon a course of reading for the School of Law. Being at that time the only public teacher of English Law in the University, I had some practical acquaintance with the sort of difficulties which beset the learner, and I endeavoured to supply the want which I have described.

In working out the plan of my book I necessarily studied the modes of treatment adopted by these two writers, and I became aware that they are based on two totally different principles. Mr. Leake treats the con-

tract as a subject of litigation, from the point of view of the pleader's chambers. He seems to ask, What are the kinds of contract of which this may be one? Then—What have I got to prove? By what defences may I be met? Sir Frederick Pollock regards the subject *ab extra*; he inquires what is the nature of that legal relation which we term contract, and how it is brought about. He watches the parties coming to terms, tells us how the contract may be made, and by what flaws in its structure it may be invalidated. Mr. Leake treats the subject from every point of view in which it can interest a litigant. Sir Frederick Pollock wrote a treatise on the Formation of Contract: only in later editions has he introduced a chapter on Performance.

To both these writers I must own myself to be under great obligations. If I try to apportion my gratitude, I should say that perhaps I obtained the most complete information on the subject from Mr. Leake, but that Sir Frederick Pollock started me on my way.

The object which I set before me was to trace the principles which govern the contractual obligation from its beginning to its end; to show how a contract is made, what is needed to make it binding, whom it may affect, how it is interpreted, and how it may be discharged. I wished to do this in outline, and in such a way as might best induce the student to refer to cases, and to acquire the habit of going to original authorities instead of taking rules upon trust. So I have cited few cases: not desiring to present to the reader all the modes in which principles have been applied to facts, and perhaps imperceptibly qualified in their application, but rather to illustrate general rules by the most recent or most striking decisions.

In successive editions I have made some changes of arrangement, and have tried to keep the book up to date. Since it first appeared, in 1879, the Legislature has been

busy with the law of Contract. The law relating to Married Women's Property, to Bankruptcy, to Bills of Exchange, to Partnership, to Mercantile Agency, has either been recast or thrown for the first time into statutory form: the effects of the Judicature Act in the general application of equitable rules and remedies have become gradually apparent in judicial decisions. Thus it has been necessary to alter parts of my book from time to time, but in this, the sixth, edition I have made many changes for the sake of greater clearness and better arrangement. The whole of the chapters on Offer and Acceptance, on the Effects of Illegality, on the Discharge of Contract by Breach, and a great part of the chapters on Mistake and Fraud, Infants and Married Women, have been re-written, and the rest of the book has undergone many minor alterations as the result of a general revision.

I should add one word as to the place assigned to Agency. It is a difficult subject to put precisely where the reader would expect to find it. It is a mode of forming the contractual relation: it is also a form of the Contract of Employment. From the first of these points of view it might form part of a chapter on Offer and Acceptance, regarding the agent as a mode of communication; or it might form part of a chapter on the Capacity of Parties, regarding Representation as an extension of contractual capacity; or, again, it might form part of a chapter on the Operation of Contract, regarding Agency as a means whereby two persons may make a contract binding on a third.

But upon the whole I think it is best to try and make the student understand that the agent represents his principal in virtue of a special contract existing between them, the Contract of Employment. There is a disadvantage, no doubt, in introducing into a treatise on the general principles of contract a chapter dealing with one of the special sorts of contract, but I believe that the student will find

less difficulty in this part of the law if he is required to understand that the agent acquires rights and incurs liabilities for his principal, not in virtue of any occult theory of representation, but because he is employed for the purpose, by a contract which the law recognizes.

I should not close this Preface without an expression of thanks to the friends who from time to time in the last ten years have helped me with suggestions or corrections of this book. To his Honour Judge Chalmers, to Sir Frederick Pollock, and in especial to the Vinerian Professor, Mr. Dicey, I owe much in the way of friendly communication on points of novelty or difficulty. Nor should a teacher of law be unmindful of his debt to the student. The process of explaining a proposition of law to a mind unfamiliar with legal ideas, necessitates a self-scrutiny which is apt to lead to a sad self-conviction of ignorance or confusion of thought; and the difficulties of the learner will often present in a new light what had become a commonplace to the teacher. Therefore I would not seem ungrateful to the law students of Trinity College, past and present, whom I have tried, and sometimes not in vain, to interest in the law of Contract.

I hope that the present edition of this book may be a little shorter than the previous one. I strongly desire to keep it within such limits as is proper to a statement of elementary principles, with illustrations enough to explain the rules laid down, and, as I hope, to induce the student to consult authorities for himself.

W. R. A.

ALL SOULS COLLEGE,
January, 1891.

PREFACE TO THE SEVENTH EDITION.

IN this, the seventh edition, I have tried to improve my book in various ways, and have made such changes as are rendered necessary by legislation and judicial decisions. These last have been numerous and important during the last year.

I must record the thanks which I owe to my friend Mr. F. F. Liddell, of All Souls College and of the Inner Temple, for his assistance in revising the proof sheets, and for many suggestions and corrections which may, I hope, make this edition more clear and useful than its predecessors.

W. R. A.

ALL SOULS COLLEGE,
May, 1893.

PREFACE TO THE EIGHTH EDITION.

THERE have not been many decisions of importance or interest since the last edition of this book was published, but the Married Women's Property Act of 1893, and the Sale of Goods Act have necessitated some changes in the text.

The latter Act is of especial interest, for it gives statutory force, in respect of the Contract of Sale, to principles and a terminology which are of general application.

W. R. A.

ALL SOULS COLLEGE,
September, 1895.

TABLE OF CONTENTS.

PART I.

PLACE OF CONTRACT IN JURISPRUDENCE.

	PAGE
Outline of subject	1
Nature of contract: agreement and obligation	1
1. Analysis of agreement	2
Requisites of agreement	2
Distinguished from contract	4
2. Analysis of obligation	6
Requisites of obligation	6
Distinguished from duty	7
Sources or forms of obligation	8
Definition of contract	11

PART II.

FORMATION OF CONTRACT.

CHAPTER I.

Offer and Acceptance.

1. Contract springs from offer and acceptance	13
Agreement traceable to question and answer	13
Forms of offer and acceptance	14
Unilateral and bilateral contracts	16
Executed and executory consideration	16
2. Offer and acceptance may be made by words or conduct	17
Difference between express and implied contracts	17n
Inferences deducible from conduct	18
3. Offer must be communicated	19
Ignorance of offered promise	19
Ignorance of offered act	20
Ignorance of offered terms	21
4. Acceptance must be communicated or manifested	23

	PAGE
5. Acceptance manifested in manner prescribed by offer	25
Requisites of communication of acceptance	25
Acceptance by post or telegraph	27
Offeror may prescribe mode of acceptance	31
Can acceptance be revoked?	32
6. Offer may lapse or be revoked	32
Lapse of offer: forms of	32
Revocation of offer	34
Valid before acceptance	35
Useless after acceptance	35
Offer under seal irrevocable	36
Must revocation be communicated?	37
<i>Cook v. Oxley</i>	38
<i>Dickinson v. Dodd</i>	39
7. Offer made to all the world	42
Offers of rewards	43
Invitations to treat	44
8. Offer must contemplate legal relations	47
9. Acceptance must be absolute	48

CHAPTER II.

Form and Consideration.

Necessity of form or consideration in valid contract	50
History of formal contract	50
History of informal contract	52
History of consideration	54
Classification of contracts in English law	56

Formal Contract.

1. Contracts of record	57
2. Contracts under seal	59
How made	60
Characteristics	61
When seal essential	66

Simple Contract.

1. Simple contracts required to be in writing	67
2. The Statute of Frauds: Fourth section	69
Provisions of the section	70
Requirements of form	75
Effect of non-compliance	80
3. The Statute of Frauds: Seventeenth section	83
Provisions of the section	84
Requirements of form	87
Effect of non-compliance	88

Consideration.

	PAGE
Definition	88
(i) Necessity of	89
(ii) Need not be adequate, but must be real	90
First test of reality : a detriment	93
Motive to be distinguished	93
Must it move from promisee ?	95
Second test of reality : ascertainable value	96
Impossible, uncertain or vague promises	96
Forbearance to sue and compromise of suit	97
Gratuitous undertakings	100
Third test of reality : more than discharge of existing obligation	102
Performance of public duty	102
Promise to perform or performance of existing contract	102
Payment of smaller sum in satisfaction of larger	104
Composition with creditors	107
Contract with third person	109
(iii) Must be legal	111
(iv) Must not be past	112
Executory and executed consideration	112
General rule : Past consideration is no consideration	114
Exceptions apparent and real	115
Consideration moved by previous request	115
Voluntary discharge of another's liabilities	121
Revival of obligation barred by rule of law	124
Additional security by debtor	127 <i>n</i>

CHAPTER III.

Capacity of Parties.

1. Political or professional status	128
2. Infancy : void, voidable, and binding contracts	131
Ratification of voidable contracts : common law and statute	131
Liability for necessaries	140
Liability for torts originating in contract	143
3. Corporations	144
4. Lunatics and drunken persons	147
5. Married women	149
Contracts void at common law : exceptions	149
Married Women's Property Acts	151
Married Women's Contract Acts	154 <i>n</i>

CHAPTER IV.

Reality of Consent.

	PAGE
1. <i>Mistake.</i>	
Non-operative mistake	157
Operative mistake	158
As to nature or existence of contract	159
As to identity of contracting party	163
As to identity of subject matter	165
As to existence of subject matter	166
As to intention known to other party	168
Effects of mistake	174
2. <i>Misrepresentation.</i>	
General considerations	174
Distinguished from fraud	176
Distinguished from terms	179
Effects of misrepresentation generally	184
Effects of non-disclosure in contracts <i>uberrimæ fidei</i>	192
Remedies for misrepresentation	199
No action for damages : exceptions	199
Estoppel	201
3. <i>Fraud.</i>	
Essential features	203
A false representation	203
Of a material fact	206
Made intentionally or recklessly	207
With intent that it be acted upon by the injured party	213
Which actually deceives	214
Effects of fraud	215
Remedies <i>ex delicto</i>	215
Remedies <i>ex contractu</i>	216
4. <i>Duress.</i>	
Its nature and effect	218
5. <i>Undue Influence.</i>	
How distinguished from fraud	219
When presumed	220
When to be proved	222
Effect of undue influence	224

CHAPTER V.

Legality of Object.

	PAGE
1. Nature of illegality	225
(i) Contracts illegal by statute	226
General rules of construction	226
Sunday statutes	228 <i>n</i>
Wagering contracts	228
Definition	228
History : common law and statute	231
On rise and fall of prices	236
Insurance	237
(ii) Contracts illegal at common law	239
Agreements to commit crime or civil wrong	239
Agreements against public policy	241
Affecting interstate relations	242
Injuring public service	243
Perverting course of justice	245
Abusing legal process	246
Against good morals	248
Affecting freedom or security of marriage	248
In restraint of trade	249
2. Effect of illegality	253
(i) When the contract is divisible	254
(ii) When the contract is indivisible	255
(iii) Comparative effect of avoidance and illegality	256
(iv) The intention of the parties	260
(v) Securities for money due on illegal contract	262
Securities under seal	262
Negotiable instruments	263
(vi) Relief from illegal contract	266
General rule	266
Exceptions : parties not in <i>pari delicto</i>	266
Exceptions : contract executory	268
The <i>locus pœnitentiæ</i>	268
Money in hand of stockholder	269
3. Meaning of terms <i>void</i> , <i>voidable</i> , <i>unenforceable</i>	271

PART III.

THE OPERATION OF CONTRACT.

CHAPTER I.

The Limits of the Contractual Obligation.

	PAGE
General rule as to privity of contract	275
Trust obligations no real exception	275
1. Third party incurring liabilities	276
No contractual obligation	276
But non-contractual duty	277
2. Third party acquiring rights	279
Promise for benefit of third party	279
One joint-party representing many	284

CHAPTER II.

The Assignment of Contract.

1. Assignment by act of the parties	287
Liabilities cannot be assigned	287
Assignment of rights	289
At common law	289
In equity: notice; title	291
By statute	294
By the law merchant: negotiability	295
2. Assignment by operation of law	305
By transfer of interest in land	306
In case of leasehold interests	306
In case of freehold interests	308
By marriage	309
By death	310
By bankruptcy	311

PART IV.

THE INTERPRETATION OF CONTRACT.

CHAPTER I.

Rules relating to Evidence.

Province of court and jury	314
Difference in proof of formal and simple contracts	315
1. Proof of document purporting to be contract	316

TABLE OF CONTENTS.

xix

	PAGE
2. Evidence as to fact of agreement	318
3. Evidence as to terms of contract	319
Supplementary or collateral terms	320
Explanation of terms	321
Usage	323
In equitable proceedings	325

CHAPTER II.

Rules relating to Construction.

1. General rules	327
2. Rules as to time and penalties	328

PART V.

DISCHARGE OF CONTRACT.

CHAPTER I.

Discharge of Contract by Agreement.

1. Waiver	333
2. Substituted contract	335
3. Provisions for discharge	338
Discharge optional on non-fulfilment of term	338
Discharge on condition subsequent	339
Discharge optional on notice	341
4. Form necessary for discharge	342

CHAPTER II.

Discharge of Contract by Performance.

When performance discharges	344
Payment as a mode of discharge	344
Tender as a mode of discharge	347
Substantial performance	348n
Performance to satisfaction of other party	348n

CHAPTER III.

Discharge of Contract by Breach.

Breach gives right of action, but not always discharge	349
1. Position of party discharged by breach	350
Exonerated from further performance	350

	PAGE
May sue for breach of contract	352
May sue for benefits conferred	350
2. Forms of discharge by breach	353
(i) Renunciation before performance due	353
(ii) Impossibility created by one party before performance due	356
(iii) Renunciation in course of performance	357
(iv) Impossibility created by one party in course of performance	358
(v) Failure of performance	359
A discharge if promises dependent	359
Not if promises independent	361
Three tests to determine dependence or independence	361
a. Are the promises absolute or do they constitute concurrent conditions	361
b. Is the broken promise divisible or indivisible	363
c. Is the broken promise vital or subsidiary: conditions and warranties	369
3. Remedies for breach	374
Damages: rules for measuring	375
Specific performance and injunction	378
4. Discharge of right of action arising from breach	382
By consent of the parties	383
Release	383
Accord and satisfaction	383
By judgment	384
By lapse of time	386

CHAPTER IV.

Discharge of Contract by Impossibility of Performance.

Impossibility distinguished from unreal consideration and mistake	390
Subsequent impossibility generally no discharge	391
Exceptions	392
Legal impossibility	393
Destruction of subject-matter	394
Incapacity for personal service	395

CHAPTER V.

Discharge of Contract by Operation of Law.

1. Merger	396
2. Alteration or loss of written instrument	397
3. Bankruptcy	398

PART VI.

AGENCY.

	PAGE
It now springs from contract of employment	400
Outline of subject	401

CHAPTER I.

**Mode in which the Relation of Principal and Agent
is created.**

Capacity of parties	402
How their agreement is expressed	402
Form of mandate. Power of attorney. Parol authority	403
Authority from conduct	403
Authority of necessity	405
Authority by ratification	405

CHAPTER II.

Effect of Relation of Principal and Agent.

Their rights and liabilities *inter se* :

Duties of principal	409
Duties of agent	409
Must use diligence	410
Must make no profit other than his commission	410
Must not take up contract himself	411
Compare sale, commission agency, brokerage	411
Must not delegate his authority	414

Relations of parties where agent contracts for a named principal :

Agent acting within his powers incurs no liability	415
Kinds of agents and their authority	416
Cases where agent is personally liable	419
Effect of agent acting without authority	420
Remedies when the agent is not liable on the contract	420

Relations of parties where principal is unnamed :

Extent of agent's liability	422
---------------------------------------	-----

Relations of parties where existence of principal is undisclosed :

Alternative liability of principal and agent	424
Principal's right to intervene	425
Determination of alternative liability	425

Liability of principal for fraud of agent	427
How far knowledge of agent is knowledge of principal	429

CHAPTER III.

Determination of Agent's Authority.

	PAGE
By agreement	430
Right to revoke limited by interest of third parties	430
Right to revoke limited by interest of agent	432
By change of status	434
By death of principal	435

CONTRACT AND QUASI CONTRACT.

Historical connection of the two legal relations	436
Debt and assumpsit	436
The indebitatus counts	437
Legal relation arising from judgment	438
Legal relation arising from account stated	439
Legal relation arising from money paid by plaintiff for defendant	439
Legal relation arising from money received by defendant to plaintiff's use	440

APPENDIX.

Form of charter-party	443
Form of bill of lading	444
Form of policy of marine insurance	445
Forms of bill of exchange and promissory note	446
INDEX	447

INDEX OF ENGLISH CASES.

THE NUMBERS REFER TO SIDE PAGINGS.

A.

CASE.	DATE.	REFERENCE.	*PAGE
Adams v. Lindsell	(1818)	1 B. & Ald. 681	24
Allcard v. Skinner	(1887)	36 Ch. D. 145	182
Allen v. Rescous	(1687)	2 Lev. 174	195
Alliance Bank v. Broom	(1864)	2 Dr. & Sm. 289	83
Anderson v. Pacific Insurance Co.	(1872)	L. R. 7 C. P. 65	156
Angus v. Clifford	(1891)	2 Ch. 449	164, 172
Appleby v. Myers	(1867)	L. R. 2 C. P. 651	324
Archer v. Hudson	(1844)	7 Beav. 560	180
Arkwright v. Newbold	(1881)	17 Ch. D. 320	144, 174
Armstrong v. Stokes	(1872)	L. R. 7 Q. B. 598	346, 350, 352
Arundel v. Trevillian	(1634)	Rep. in Chancery, 47	202
Ashbury Carriage Co. v. Riche ..	(1874)	{ L. R. 9 Exch. 264 } { L. R. 7 H. L. 653 }	119, 207, 229
Asiatic Banking Corp., <i>Ex parte</i> ..	(1867)	2 Ch. 397	239
Astley v. Weldon	(1801)	2 B. & P. 346	270
Atherfold v. Beard	(1788)	2 T. R. 610	215
Atkins v. Banweil	(1802)	2 East, 505	101
Atkinson v. Denby	(1861)	{ 6 H. & N. 778 } { 7 H. & N. 934 }	217
Atlee v. Backhouse	(1838)	3 M. & W. 633	178
Avery v. Bowden	(1855)	5 E. & B. 714	292
Ayerst v. Jenkins	(1873)	16 Eq. 275	202, 213
Aylesford (Earl of) v. Morris ..	(1873)	8 Ch. 484	178

B.

Babcock v. Lawson	(1879)	4 Q. B. D. 394	177, 222
Baguely v. Hawley	(1867)	L. R. 2 C. P. 625	306
Baily v. De Crespigny	(1869)	L. R. 4 Q. B. 180	323, 324
Bainbridge v. Firmstone	(1838)	8 A. & E. 743	76
Bainbridge v. Browne	(1881)	18 Ch. D. 196	181
Baines v. Geary	(1887)	35 Ch. D. 154	207
Baker v. Hedgecock	(1888)	39 Ch. D. 520	207
Bank of England, <i>Ex parte</i>	(1895)	1 Ch. 37	317
Bannerman v. White	(1861)	10 C. B., N. S. 844	150, 151, 155
Barclay v. Pearson	(1893)	2 Ch. 154	220
Barrow v. Dyster	(1884)	13 Q. B. D. 635	350
Barry v. Croskey	(1861)	2 J. & H. 1	174, 175
Barter, <i>Ex parte</i>	(1884)	26 Ch. D. 510	196
Barwick v. Eng. Joint Stock Bank	(1867)	L. R. 2 Ex. 259	353

CASE.	DATE.	REFERENCE.	*PAGE
Bawden v. London & Cy. Ass. Co.	(1892)	2 Q. B. 534	354
Baxter v. Burfield	(1746)	2 Str. 1266	253
Bayley v. Homan	(1837)	3 Bing. N. C. 920	316
Beauchamp (Earl) v. Winn	(1873)	L. R. 6 H. L. 232	266
Beaumont v. Greatehead	(1846)	2 C. B. 494	309
Beaumont v. Reeve	(1846)	8 Q. B. 483	202, 213
Beckham v. Drake	(1841)	9 M. & W. 95	346
Begbie v. Phosphate Sewage Co ..	(1875)	L. R. 10 Q. B. 499	196, 216
Behn v. Burness	(1862)	{ 1 B. & S. 877 }	{ 147, 289,
		{ 3 B. & S. 751 }	{ 306, 307
Bellamy v. Debenham	(1890)	45 Ch. D. 481	42
Bentley v. Vilmont	(1887)	12 App. Ca. 471	177
Berkeley v. Elderkin	(1853)	1 E. & B. 805	51
Bettini v. Gye	(1876)	1 Q. B. D. 183 & 187	304, 305
Beverley v. Lincoln Gas & Coke Co.	(1837)	6 A. & E. 829	288
Bickerton v. Burrell	(1816)	5 M. & S. 383	346
Bidder v. Bridges	(1887)	37 Ch. D. (C. A.) 406	316
Bingham v. Bingham	(1748)	1 Ves. Senr. 126	136
Birkmyr v. Darnell	(1704)	1 Sm. L. C. 310, 1 Salkeld 27 ..	62
Birmingham Land Co. & Allday, <i>In re</i>	(1893)	1 Ch. 348	252
Blachford v. Preston	(1799)	8 T. R. 89	198
Blackburn v. Vigors	(1886)	{ 17 Q. B. D. (C. A.) 553 } ..	{ 158, 354
		{ 12 App. Ca. 531 }	
Blades v. Free	(1829)	9 B. & C. 167	360
Blair v. Bromley	(1846)	5 Hare, 559	319
Bloomer v. Bernstein	(1874)	L. R. 9 C. P. 588	300
Bloxam v. Sanders	(1825)	4 B. & C. 941	298
Bolton v. Madden	(1873)	L. R. 9 Q. B. 55	76
Borries v. Imperial Ottoman Bank	(1873)	L. R. 9 C. P. 38	351
Boulton v. Jones	(1857)	2 H. & N. 564	132, 133, 134
Bourne v. Mason	(1679)	1 Ventr. 6	229
Bowen v. Hall	(1881)	6 Q. B. D. 333	227
Bowman v. Taylor	(1834)	2 A. & E. 278	53
Boyd v. Hind	(1857)	1 H. & N. 938	90
Boydell v. Drummond	(1809)	11 East, 142	67
Bradford v. Roulston	(1858)	8 Ir. C. L. 468	98
Bradlaugh v. Newdegate	(1882)	11 Q. B. D. 5	201
Brashford v. Buckingham and wife	(1605)	Cro. Jac. 77	122
Brayshaw v. Eaton	(1839)	7 Scott, 187	117
Brice v. Bannister	(1877)	3 Q. B. D. 569	239
Bridger v. Savage	(1884)	15 Q. B. D. (C. A.) 363	210
Britain v. Rossiter	(1882)	11 Q. B. D. 123	69, 74
British and American Telegraph } Co. v. Colson	(1871)	L. R. 6 Ex. 108	25
British Waggon Co. v. Lea	(1879)	5 Q. B. D. 149	234
Brittain v. Lloyd	(1845)	14 M. & W. 762	95
Brogden v. Metropolitan Railway	(1877)	2 App. Ca. 691	2, 22
Brook v. Hook	(1871)	L. R. 6 Ex. 89	336
Brown v. Byrne	(1854)	3 E. & B. 716	265
Brown v. Duncan	(1829)	10 B. & C. 93	185
Brownlie v. Campbell	(1880)	5 App. Ca. 950	172
Bryant v. Herbert	(1878)	3 C. P. D. 389	45
Budgett v. Binnington	(1891)	1 Q. B. 35	323
Burges v. Wickham	(1863)	3 B. & S. 696	263, 264
Burgess v. Eve	(1872)	13 Eq. 450	162
Burnard v. Haggis	(1663)	14 C. B., N. S. 45	118
Burrell's Case	(1876)	1 Ch. D. 552	168
Butler and Baker's Case	(1591)	Coke, Rep. iii. 26. b	32
Buxton v. Rust	(1872)	L. R. 7 Exch. 1 & 279	65
Bryne v. Van Tienhoven	(1880)	5 C. P. D. 344	33

INDEX OF CASES.

XXV

CASE.	DATE.	REFERENCE.	*PAGE
Caddick v. Skidmore	(1857)	De G. & J. 52	66
Callisher v. Bischoffsheim	(1879)	L. R. 5 Q. B. 449	83
Cannan v. Bryce	(1819)	3 B. & Ald. 179	209
Card v. Hope	(1824)	2 B. & C. 661	198
Carlill v. Carbolic Smoke Ball Co. {	(1892)	2 Q. B. 434	22, 39
	(1893)	1 Q. B. (C. A.) 269	
Carter v. Silber	(1892)	2 Ch. (C. A.) 278	114
Cartwright v. Cartwright	(1858)	3 D. M. & G. 982	202
Cassaboglou v. Gibbs	(1882)	9 Q. B. D. 220	340
Castellain v. Preston	(1883)	11 Q. B. D. (C. A.) 380	194
Castlegate Steamship Co. v. Dempsey	(1892)	1 Q. B. (C. A.) 854	323
Chamberlain v. Williamson	(1814)	2 M. & S. 408	253
Chanter v. Hopkins	(1838)	4 M. & W. 404	302, 306
Charnley v. Winstanley	(1804)	5 East, 266	359
Charter v. Trevelyan	(1844)	11 Cl. & F. 714	177
Clay v. Yates	(1856)	1 H. & N. 73	195
Clegg v. Hands	(1890)	44 Ch. D. 503	250, 313
Clements v. London & N. W. R. Co.	(1894)	2 Q. B. (C. A.) 482	112
Clifford v. Watts	(1871)	L. R. 5 C. P. 577	306, 321
Clough v. London & N. W. R. Co.	(1871)	L. R. 7 Ex. 35	177
Crolegate v. Bachelor	(1596)	Cro. Eliz. 872	202
Coles v. Trecothick	(1804)	9 Ves. 234 & 246	77, 179
Collen v. Wright	(1857)	{ 7 E. & B. 301 8 E. & B. 647 }	306, 347, 360
Collins v. Blanterm	(1766)	1 Sm. L. C. 398	55
Collins v. Evans	(1844)	5 Q. B. 820	170
Collins v. Godefroy	(1831)	1 B. & A. 950	85
Colson's Case	(1871)	L. R. 6 Ex. 108	25
Confians Quarry Co. v. Parker ..	(1867)	L. R. 3 C. P. 1	328
Cooch v. Goodman	(1842)	2 Q. B. 597	52
Cook v. Oxley	(1790)	3 T. R. 653	33
Cooper v. Phibbs	(1867)	L. R. 2 H. L. 170	136, 168
Cope v. Rowlands	(1836)	2 M. & W. 158	185
Corn v. Matthews	(1893)	1 Q. B. 310	112
Cornish v. Stubbs	(1870)	L. R. 5 C. P. 339	250
Cort v. Ambergate Railway Co. ..	(1851)	17 Q. B. 127	289, 293
Couturier v. Hastie	(1856)	5 H. L. C. 673	135
Coverdale v. Eastwood	(1872)	15 Eq. 121	146
Cowan v. Milbourn	(1867)	L. R. 2 Exch. 230	212
Cowan v. O'Connor	(1888)	20 Q. B. D. 640	26
Coxhead v. Mullis	(1878)	3 C. P. D. 439	115
Crears v. Hunter	(1887)	19 Q. B. D. 345	15
Crouch v. Credit Foncier of England	(1873)	L. R. 8 Q. B. 374	238, 244
Cumber v. Wane	(1718)	1 Sm. L. C. 366	86
Cundy v. Lindsay	(1878)	3 App. Ca. 459	133, 177, 221
Currie v. Misa	(1875)	L. R. 10 Exch. 162	74, 77
Cutter v. Powell	(1795)	6 T. R. 320	300
Cuxon v. Chadley	(1824)	3 B. & C. 591	235

D.

Dalby v. The Lond. Life Assur. Co.	(1854)	15 C. B. 365	195
Dalton v. Midland Coun. Railway Co.	(1853)	13 C. B. 478	122
Darrell v. Tibbitts	(1880)	5 Q. B. D. 560	194
Davey v. Shannon	(1879)	4 Ex. D. 81	64
Davies v. Davies	(1887)	36 Ch. D. 359	41, 81
Davis v. Foreman	(1894)	3 Ch. 654	314
Debenham v. Mellon	(1880)	{ 5 Q. B. D. 403 6 App. Ca. 24 }	332, 355
De Bussche v. Alt	(1878)	8 Ch. D. 310	341

CASE.	DATE.	REFERENCE.	*PAGE
De Francesco v. Barnum	(1890)	43 Ch. D. 165	112
De Mattos v. Benjamin	(1894)	63 L. J., Q. B. 248	191
Denton v. G. N. Railway Co. . .	(1856)	5 E. & B. 860	39
Derry v. Peek	(1889)	14 App. Ca. 347 { 145, 156, 164, 169, 171	
De Wutz v. Hendricks	(1824)	2 Bing. 316	198
Dickinson v. Dodds	(1876)	2 Ch. D. 463	29, 34
Dickson v. Reuter's Telegraph Co.	(1877)	3 C. P. D. 1	169
Dimmock v. Hallett	(1806)	2 Ch. 27	156
Ditcham v. Worrall	(1880)	5 C. P. D. 410	116
Dixon v. Clarke	(1848)	5 C. B. 376	285
Dobson v. Espie	(1857)	2 H. & N. 79	274
Doe d. Garnons v. Knight	(1826)	5 B. & C. 671	31
Donellan v. Read	(1832)	3 B. & A. 899	64
Drake v. Beckham	(1843)	11 M. & W. 319	254
Drew v. Nunn	(1879)	4 Q. B. D. 661	359
Duncan v. N. & S. Wales Bank	(1880)	6 App. Ca. 1	242
Dunlop v. Higgins	(1848)	1 H. L. C. 381	25
Durnford v. Messiter	(1816)	5 M. & S. 446	225
Dutton v. Poole	(1688)	2 Lev. 210	80

E.

Earle v. Oliver	(1848)	2 Exch. 90	103
Eastland v. Burchell	(1878)	3 Q. B. D. 436	334
Eastwood v. Kenyon	(1840)	11 A. & E. 438	80, 105
Edgington v. Fitzmaurice	(1885)	29 Ch. D. 483	169
Edmunds v. Bushell	(1865)	L. R., Q. B. 97	343
Edwards v. Aberayron Insur. Soc.	(1876)	1 Q. B. D. 587	200, 259
Edwards v. Carter	(1893)	A. C. 360	114
Egerton v. Earl Brownlow	(1853)	4 H. L. C. 1	197
Eicholz v. Bannister	(1864)	17 C. B., N. S. 708	306
Elderton v. Emmens	(1847)	4 C. B. 496	97
Eley v. Positive Life Assur. Co. .	(1876)	1 Ex. D. (C. A.) 88	229
Eliason v. Henshaw	(1819)	4 Wheaton, 225	29
Elsee v. Gatward	(1793)	5 T. R. 143	84
Empress Engineering Co., <i>In re</i> ..	(1880)	16 Ch. D. (C. A.) 125	230
England v. Davidson	(1840)	11 A. & E. 856	17, 37, 85, 94
England v. Marsden	(1866)	L. R. 1 C. P. 529	364
Erlanger v. Sombrero Phosphate Co.	(1878)	3 App. Ca. 1279	163
Erskine v. Adeane	(1873)	8 Ch. 766	262
Esposito v. Bowden	(1875)	7 E. & B. 763	197
Evelyn v. Chichester	(1765)	3 Burr. 1717	109
Exall v. Partridge	(1799)	8 T. R. 308	364

F.

Fairlie v. Denton	(1828)	8 B. & C. 400	235
Fairlie v. Fenton	(1870)	L. R. 5 Ex. 169	346
Farrington v. Forrester	(1893)	2 Ch. D. 461	114
Faulkner v. Lowe	(1848)	2 Exch. 595	5
Fawcett v. Holmes	(1889)	42 Ch. D. 150	160
Fawcett v. Whitehouse	(1829)	1 R. & M. 132	161
Featherston v. Hutchinson	(1590)	Cro. Eliz. 199	207
Felthouse v. Bindley	(1862)	11 C. B., N. S. 869	21
Ferguson v. Wilson	(1866)	2 Ch. 89	119
Findon v. Parker	(1843)	11 M. & W. 682	201
Finley v. Chirney	(1887)	20 Q. B. D. (C. A.) 494	253, 310
Firbank v. Humphreys	(1886)	18 Q. B. D. 62	163, 348
Fisher v. Bridges	(1854)	3 E. & B. 642	213
Fishmongers' Co. v. Robertson ..	(1843)	5 M. & Gr. 192	58

CASE.	DATE.	REFERENCE.	*PAGE
Fitch v. Jones	(1855)	5 E. & B. 245	214
Fitch v. Snedaker	(1868)	38 N.Y. 248; Langdell, 110	16, 37
Fitch v. Sutton	(1804)	5 East, 230	89
Fleet v. Murton	(1871)	L. R. 7 Q. B. 126	345
Flight v. Bolland	(1828)	4 Russ. 298	313
Flight v. Booth	(1834)	1 Bing. N. C. 370	160
Flight v. Reed	(1863)	1 H. & C. 703	103
Flood v. Jackson	(1895)	2 Q. B. (C. A.) 27	227
Flower v. Sadler	(1882)	10 Q. B. D. 572	215, 243
Flower v. L. & N. W. Rly. Co. ..	(1894)	2 Q. B. 65	112
Foakes v. Beer	(1884)	9 App. Ca. 605	89
Ford v. Beech	(1848)	11 Q. B. 866	268
Foster v. Charles	(1830)	7 Bing. 105	144
Foster v. Dawber	(1851)	6 Exch. 839	14, 87, 275
Foster v. Mackinnon	(1869)	L. R. 4 C. P. 704	131
Fowkes v. Manchester Assur. Assoc.	(1863)	3 B. & S. 929	269
Fowler v. Fowler	(1859)	4 D. & J. 250	267
Freeman v. Cooke	(1848)	2 Exch. 654	136
Freeth v. Burr	(1874)	L. R. 9 C. P. 208	299
Frost v. Knight	(1872)	L. R. 7 Exch. 114	291
Fry, <i>In re</i>	(1888)	40 Ch. D. 324	183

G.

Garrard v. Frankel	(1862)	30 Beav. 445	141, 267
Geipel v. Smith	(1872)	L. R. 7 Q. B. 404	278
Gibbons v. Proctor	(1892)	64 Law Times Reports 594	17, 37
Gibbs v. Guild	(1882)	9 Q. B. D. 66	319
Gibson v. Carruthers	(1841)	8 M. & W. 339	247
Gilbert v. Sykes	(1812)	16 East, 150	189, 196
Glaholm v. Hayes	(1841)	2 M. & G. 257	148, 304
Goddard v. O'Brien	(1882)	9 Q. B. D. 37	88, 316
Godsall v. Boldero	(1807)	9 East, 72	195
Goman v. Salisbury	(1684)	1 Vern. 239	281
Good v. Cheesman	(1831)	2 B. & Ad. 328	90
Goode v. Harrison	(1821)	5 B. & Ald. 159	110
Goodman v. Chase	(1818)	1 B. & Ald. 297	62
Goss v. Lord Nugent	(1833)	5 B. & A. 65	281
Graham v. Johnson	(1869)	8 Eq. 36	238
Graves v. Legg	(1854)	9 Exch. 709	307
Gray v. Mathias	(1800)	5 Ves. 285	202
Gray v. Pearson	(1870)	L. R. 5 C. P. 568	230
Great North. Rail. Co. v. Witham ..	(1873)	L. R. 9 C. P. 16	30
Greaves v. Ashlin	(1813)	3 Camp. 426	67
Grebert-Borgnis v. Nugent	(1885)	15 Q. B. D. 85	310
Grisewood v. Blane	(1851)	11 C. B. 538	193
Gurney v. Behrend	(1854)	3 E. & B. 622	248
Guthing v. Lynn	(1831)	2 B. & Ad. 232	41
Gwilliam v. Twist	(1895)	43 W. R. 566	334
Gylbert v. Fletcher	(1629)	Cro. Car. 179	112

H.

Hadley v. Baxendale	(1854)	9 Exch. 354	309
Haigh v. Brooks	(1839)	10 A. & E. 309	77, 269
Halifax v. Barker	(1600)	3 Dyer, 272 a; Cro. Eliz. 741	99
Hall v. Ewin	(1887)	37 Ch. D. (C. A.) 74	252
Hall v. Warren	(1805)	9 Ves. 605	121
Hamilton v. Kendall	(1879)	4 App. Ca. 514	352
Hamilton v. Vaughan Sherrin Elec- trical Co.	(1894)	3 Ch. 589	113

CASE.	DATE.	REFERENCE.	*PAGE
Hammersley v. de Biel	(1845)	12 Cl. F. F. 62	15
Hampden v. Walsh	(1876)	1 Q. B. D. 189	219
Hancocks v. Lablache	(1878)	3 C. P. D. 197	124
Hansard v. Robinson	(1827)	7 B. & C. 90	328
Hardman v. Booth	(1863)	1 H. & C. 803	134
Harrington v. Vict. Graving Dock Co. (1878)		3 Q. B. D. 549	338
Harris v. Brisco	(1886)	17 Q. B. D. 504	201
Harris' Case	(1872)	L. R. 7 Ch. 587	25
Harris v. Nickerson	(1873)	L. R. 8 Q. B. 286	38
Harris v. Pepperell	(1867)	5 Eq. 1.	141
Harris v. Rickett	(1859)	4 H. & N. 1	259
Hart v. Alexander	(1837)	2 M. & W. 484	277
Hart v. Miles	(1858)	4 C. B., N. S. 371	84
Hart v. Mills	(1846)	15 M. & W. 87	15, 94
Hartley v. Ponsonby	(1857)	7 E. & B. 872	86
Hartley v. Rice	(1808)	10 East, 22	202
Harvey v. Gibbons	(1675)	2 Lev. 161	81
Harvey v. Young	(1602)	1 Yelv. 20	168
Hastelow v. Jackson	(1828)	8 B. & C. 225	220
Hawken v. Bourne	(1841)	8 M. & W. 710	333
Haydon v. Williams	(1830)	7 Bing. 163	328
Hayes v. Warren	(1731)	2 Str. 932	362
Haywood v. Brunswick Build. Soc. (1881)		8 Q. B. D. 410	252
Head v. Tattersall	(1871)	L. R. 7 Exch. 7	277
Heather v. Webb	(1876)	2 C. P. D. 1.	328
Hebb's Case	(1867)	L. R. 4 Eq. 9	27
Henderson v. Stevenson	(1875)	L. R. 2 H. L. Sc. App. 470	19
Henkel v. Pape	(1870)	L. R. 6 Exch. 7	131
Henthorn v. Fraser	(1892)	2 Ch. (C. A.) 27	26, 33
Hermann v. Jeuchner	(1885)	15 Q. B. D. 561	218
Hichens v. Congreve	(1829)	1 R. & M. 150	161
Hickman v. Haynes	(1875)	L. R. 10 C. P. 606	276
Higgen's Case	(1605)	6 Co. Rep. 45 b	326
Higgins v. Senior	(1841)	8 M. & W. 834	345, 351
Hill v. Wilson	(1873)	L. R. 8 Ch. 888	3
Hills v. Evans	(1861)	31 L. J. Ch. 457	265
Hills v. Sughrue	(1846)	15 M. & W. 253	321
Hirschfield v. London, Brighton, & South Coast Railway Co.	(1876)	2 Q. B. D. 1	168
Hitchcock v. Coker	(1837)	6 A. & E. 438	205
Hoadley v. McLaine	(1834)	10 Bing. 482	73, 93
Hoare v. Rennie	(1859)	5 H. & N. 19	300
Hochster v. Delatour	(1853)	2 E. & B. 678	290
Hoghton v. Hoghton	(1852)	15 Beav. 299	179
Hollins v. Fowler	(1874)	L. R. 7 H. L. 757	134, 177
Holman v. Johnson	(1875)	Cowp. 341	198
Holmes v. Bell	(1841)	3 M. & G. 213	326
Holtby v. Hodgson	(1889)	24 Q. B. D. 109	126
Honck v. Muller	(1881)	7 Q. B. D. 92	300
Honeyman v. Marryat	(1857)	6 H. L. C. 112	42
Hood Barrs v. Cathcart	(1894)	2 Q. B. (C. A.) 559	125
Hopkins v. Logan	(1839)	5 M. & W. 241	363
Horne v. Midland Railway Co.	(1873)	L. R. 8 C. P. 131	310
Horsfall v. Thomas	(1862)	1 H. & C. 90	174
Houldsworth v. City of Glasgow Bk. (1880)		5 App. C. A. 317	176
Household Fire Ins. Co. v. Grant	(1879)	4 Ex. D. 216	24, 25
Hoyle v. Hoyle	(1893)	1 Ch. 99	5, 61
Hudson v. Revett	(1829)	5 Bing. 387	53
Huguenin v. Baseley	(1807)	14 Ves. 273	181
Hulle v. Heightman	(1802)	2 East, 145	288

CASE.	DATE.	REFERENCE.	*PAGE
Humble v. Hunter	(1848)	12 Q. B. 310 ..	233, 348, 351
Hunt v. Bate	(1868)	Dyer, 272 a ..	96
Hunt v. Wimbledon Local Board ..	(1878)	4 C. P. D. 53 ..	53
Hunter v. Walters	(1871)	L. R. 7 Ch. 81 ..	130
Huscombe v. Standing	(1607)	Cro. Jac. 187 ..	177
Hussey v. Horne Payne	(1879)	4 App. Ca. 311 ..	42
Hutcheson v. Eaton	(1884)	13 Q. B. D. 861 ..	349
Hutton v. Warren	(1836)	1 M. & W. 466 ..	264
Hyde v. Wrench	(1840)	3 Beav. 334 ..	42

I.

Imperial Loan Co. v. Stone	(1892)	1 Q. B. 599	120, 359
Ionides v. Pacific Insurance Co. ..	(1871)	L. R. 6 Q. B. 686 ..	135
Ionides v. Pender	(1874)	L. R. 9 Q. B. 537 ..	157
Ireland v. Livingston	(1872)	L. R. 5 H. L. 407 ..	339, 345
Irvine v. Watson	(1879)	5 Q. B. D. 107 (C.A.)	414 352
Irving v. Veitch	(1837)	3 M. & W. 106	363

J.

Jackson v. Colegrave	(1694)	Carthew, 338	189
Jackson v. Union Marine Ins. Co. ..	(1874)	L. R. 10 C. P. 148 ..	301
Jakeman v. Cook	(1878)	4 Ex. D. 26	103
James v. Kerr	(1889)	40 Ch. D. 458	201
Jay v. Robinson	(1890)	25 Q. B. D. 467	125
Jenkins v. Betham	(1854)	15 C. B. 168	337
Jennings v. Rundall	(1799)	8 T. R. 335	117
Jervis v. Berridge	(1873)	8 Ch. 351	261
Johnson v. Gallagher	(1861)	3 D. F. & J. 494 ..	123
Johnson v. Royal Mail Steam Co. ..	(1867)	L. R. 3 C. P. 43	363
Johnstone v. Marks	(1887)	19 Q. B. D. 509	117
Johnstone v. Milling	(1886)	16 Q. B. D. 460	291
Jones, <i>Ex parte</i>	(1881)	18 Ch. D. 109	112
Jones v. Ashburnham	(1804)	4 East, 463	82
Jones v. Daniel	(1894)	2 Ch. 332	42
Jones v. Edney	(1812)	3 Camp. 285	160
Jones v. Just	(1868)	L. R. 3 Q. B. 197 ..	137, 301, 306
Jones v. Lees	(1856)	1 H. & N. 189	203
Jones v. Morris	(1849)	3 Exch. 742	364

K.

Kaye v. Dutton	(1844)	7 M. & Gr. 807	97
Kearly v. Thomson	(1890)	24 Q. B. D. (C. A.)	742 218, 219
Keates v. Lord Cadogan	(1851)	10 C. B. 591	167
Keir v. Leeman	(1844)	6 Q. B. 321 & 9 Q. B.	395.. 200
Kekewich v. Manning	(1851)	1 D. M. & G. 188 ..	179, 313
Kelly v. Solari	(1841)	9 M. & W. 58	142
Kelner v. Baxter	(1866)	L. R. 2 C. P. 174 ..	229, 335, 360
Kemble v. Farren	(1820)	6 Bing. 147	270, 271
Kemp v. Finden	(1844)	12 M. & W. 421	363
Kemp v. Pryor	(1802)	7 Ves. 246	334
Kennedy v. Broun	(1863)	13 C. B., N. S. 677 ..	97, 108
Kennedy v. Panama Steam Co. ..	(1867)	L. R. 2 Q. B. 580 ..	146, 155
Keppel v. Baily	(1834)	2 Mylne & Keen, 517..	251
Kibble's Case	(1875)	10 Ch. 373	115
King v. Gillett	(1840)	7 M. & W. 55	274
Kingsford v. Merry	(1856)	1 H. & N. 503	134
Kirkham v. Marter	(1819)	2 B. & Ald. 613	62, 63

CASE.	DATE.	REFERENCE.	*PAGE
Lamare v. Dixon	(1873)	L. R. 6 H. L. 414	113
Lampleigh v. Braithwait	(1614)	{ 1 Sm. L. C. 141, 153 } 95, 96, 100, Hobart, 105 } 331	
Lancaster v. Walsh	(1838)	4 M. & W. 16	37
Langridge v. Levy	(1837)	2 M. & W. 519	173
Law v. Local Board of Redditch ..	(1892)	1 Q. B. 127	270
Law v. London Indisputable Life } Policy Co.	(1855)	1 K. & J. 229	194
Leak v. Driffield	(1889)	24 Q. B. D. 98	124
Leask v. Scott	(1877)	2 Q. B. D. 376	82
Le Blanche v. L. & N. W. R. Co. ..	(1876)	1 C. P. D. 286	40, 305
Lee v. Griffin	(1861)	1 B. & S. 272	73
Lee v. Jones	(1864)	17 C. B., N. S. 482	161
Lee v. Muggeridge	(1813)	5 Taunt. 36	103, 104
Leeds Bank v. Walker	(1883)	11 Q. B. D. 84	327
Le Lievre v. Gould	(1893)	1 Q. B. 491	164
Lennard v. Robinson	(1855)	5 E. & B. 125	346
Leroux v. Brown	(1852)	12 C. B. 801	69
Leslie v. Fitzpatrick	(1877)	3 Q. B. D. 229	112
Louis v. Nicholson	(1852)	18 Q. B. 503	346
Lickbarrow v. Mason	(1893)	1 Sm. L. C. 737	247
Lindsay Petroleum Co. v. Hurd ..	(1874)	L. R. 5 P. C. 243	168
Lister v. Stubbs	(1890)	45 Ch. D. 15	338
Littlefield v. Shee	(1831)	2 B. & Ad. 811	104
Liversidge v. Broadbent	(1859)	4 H. & N. 603, 610	235, 236
Llanelly R. Co. v. L. & N. W. R. Co. (1875)	(1875)	L. R. 7 H. L. 567	317
London Assurance Co. v. Mansel ..	(1879)	11 Ch. D. 363	158, 159
London Joint Stock Bank v. Simmons (1892)	(1892)	A. C. 217	244
Long v. Millar	(1879)	4 C. P. D. 456	67, 259
Lovelock v. Franklyn	(1846)	8 Q. B. 371	292
Low v. Bouverie	(1891)	3 Ch. (C. A.) 82	164
Lowe v. Pears	(1768)	4 Burr. 2225	202
Lucan, <i>In re</i>	(1890)	45 Ch. D. 470	313
Lumley v. Gye	(1853)	2 E. & B. 216	226, 227
Lumley v. Wagner	(1852)	1 D. M. & G. 604	313
Lumsden's Case	(1868)	4 Ch. 31	110
Lynn v. Bruce	(1794)	2 H. Bl. 319	89

M.

Macartney v. Garbutt	(1890)	24 Q. B. D. 368	107
Macdonald v. Longbottom	(1859)	1 E. & E. 977	263
McGregor v. McGregor	(1888)	21 Q. B. D. 424	123
MacIver v. Richardson	(1813)	1 M. & S. 557	23
Mackenzie v. Coulson	(1869)	8 Eq. 375	267
McKinnell v. Robinson	(1838)	3 M. & W. 434	209
McManus v. Bark	(1870)	L. R. 5 Ex. 65	316
McManus v. Cooke	(1887)	35 Ch. D. 682	70
McPherson v. Watt	(1877)	3 App. Ca. 254	340
Maddick v. Marshall	(1864)	16 C. B., N. S. 393	343
Maddison v. Alderson	(1883)	8 App. Ca. 479	70, 74
Mallalieu v. Hodgson	(1851)	16 Q. B. 689	195
Mallan v. May	(1843)	{ 11 M. & W. 665, 653 } 13 M. & W. 517 } 55, 268	
Manby v. Scott	(1659)	1 Sid. 129	117
Mangles v. Dixon	(1852)	3 H. L. C. 702	238
Mann v. Edinburgh Tramways Co. (1893)	(1893)	A. C. 79	336
Marriot v. Hampton	(1796)	2 Sm. L. C. 441, and notes	364
Matthews v. Baxter	(1873)	L. R. 8 Exch. 132	121

CASE.	DATE.	REFERENCE.	*PAGE
Mattock v. Kinglake	(1839)	10 A. & E. 50	298
Mavor v. Pyne	(1825)	3 Bing. 285	15, 288
Maxim-Nordenfelt Co. v. Nordenfelt {	(1893)	1 Ch. (C. A.) 665 ..	197, 204, 207
	(1894)	A. C. 549	
Mayor of Kidderminster v. Hardwick	(1873)	L. R. 9 Ex. 24	58
Mayor of Ludlow v. Charlton ..	(1840)	6 M. & W. 815	57
Melhado v. Porto Alegre Rail. Co.	(1874)	L. R. 9 C. P. 503	229
Mersey Steel & Iron Co. v. Naylor	(1884)	9 App. Ca. 434	300
Meyer v. Dresser	(1864)	16 C. B., N. S. 646 ..	265
Mighell v. The Sultan of Johore ..	(1894)	1 Q. B. (C. A.) 149 ..	107
Milnes v. Dawson	(1850)	5 Exch. 950	245
Minett v. Forester	(1811)	4 Taunt. 541	359
Minshull v. Oakes	(1858)	2 H. & N. 793	249
Mitchell v. Homfray	(1881)	8 Q. B. D. 587	182
Molton v. Camroux	(1848)	2 Exch. 487 & 4 Exch. 17 ..	121
Moore & De la Torre's Case	(1874)	18 Eq. 661	176
Morison v. Thompson	(1874)	L. R. 9 Q. B. 480	338
Mortimore v. Wright	(1840)	6 M. & W. 482	79
Morton v. Lamb	(1797)	7 T. R. 125	298
Moses v. Macferlan	(1760)	2 Burr. 1005, 1010 ..	364
Mountstephen v. Lakeman	(1871)	L. R. 7 H. L. 17	65
Moxon v. Payne	(1873)	8 Ch. 881	183
Murray v. Flavell	(1883)	25 Ch. D. 89	230
Murray v. Parker	(1854)	19 Beav. 305	267
Musurus Bey v. Gadban	(1894)	2 Q. B. (C. A.) 352 ..	318

N.

Nash v. Armstrong	(1861)	10 C. B., N. S. 259	280
National Exchange Co. v. Drew ..	(1855)	2 Macq. H. L. C. 146 ..	353
Newbigging v. Adam	(1886)	34 Ch. D. 582	154, 163
New Brunswick Railway Co. v. {	(1860)	1 Dr. & Sm. 381	160
Muggeridge			
New York Bowery Fire Ins. Co. v. {	(1837)	17 Wend. 359	158
New York Fire Ins. Co.			
New Zealand Co. v. Watson	(1881)	7 Q. B. D. (C. A.) 374 ..	342
Nichol v. Bestwick	(1858)	28 L. J. Exch. 4	328
Nichol v. Godts	(1854)	10 Exch. 191	302
Nicholson v. Bradfield Union ..	(1866)	L. R. 1 Q. B. 620	57
Noble v. Ward	(1867)	L. R. 2 Exch. 135	281
Norden Steam Co. v. Dempsey ..	(1876)	1 C. P. D. 658	265
Northcote v. Doughty	(1879)	4 C. P. D. 385	115
N. W. Rail. Co. v. McMichael ..	(1850)	5 Exch. 114	109
Nowlan v. Ablett	(1835)	2 C. M. & R. 54	280
Nugent v. Smith	(1875)	1 C. P. D. 19, 423	279

O.

Oakes v. Turquand	(1867)	L. R. 2 H. L. 325	176
Offord v. Davies	(1862)	12 C. B., N. S. 748	29, 30
Ogle v. Earl Vane	(1867)	{ L. R. 2 Q. B. 275 } ..	276
		{ L. R. 3 Q. B. 272 } ..	
Oldershaw v. King	(1857)	2 H. & N. 517	16
Oliver v. Hunting	(1890)	44 Ch. D. 205	67
O'Mealey v. Wilson	(1808)	1 Camp. 483	107
O'Neil v. Armstrong	(1895)	2 Q. B. 70	294
Onward Building Society v. Smithson	(1893)	1 Ch. 1	51
O'Rorke v. Bolingbroke	(1877)	2 App. Ca. 814	180
O'Sullivan v. Thomas	(1895)	1 Q. B. 698	191, 220

CASE.	P.	DATE.	REFERENCE.	*PAGE
Paget v. Marshall	(1884)	28 Ch. D. 255	141, 267	
Palliser v. Gurney	(1887)	19 Q. B. D. 519	124	
Palmer v. Johnson	(1884)	13 Q. B. D. (C. A.) 351 ..	160	
Palmer v. Temple	(1839)	9 A. & E. 521	317	
Paradine v. Jane	(1647)	Aleyn, 26	322	
Parker v. Ibbetson	(1858)	4 C. B., N. S. 347	280	
Parker v. S. E. Railway Co. ..	(1877)	2 C. P. D. 416	19	
Pattinson v. Luckley	(1875)	L. R. 10 Ex. 330	327	
Payne v. Haine	(1847)	16 M. & W. 541	264	
Payne v. Mayor of Brecon	(1858)	3 H. & N. 579	214	
Paynter v. Williams	(1833)	1 C. & M. 810	15, 101	
Pearce v. Brooks	(1866)	L. R. 1 Exch. 213	202, 209, 212	
Peek v. Derry	(1888)	37 Ch. D. 541, 565	171	
Peek v. Gurney	(1873)	{ L. R. 6 H. L. } 161, 166, 172, 174, 403 } 175		
Pelton v. Harrison	(1892)	1 Q. B. 121	126	
Perry v. Barnett	(1885)	15 Q. B. D. 388	211	
Peter v. Compton	(1693)	1 Sm. L. C. 359	64	
Phillips v. Foxall	(1872)	L. R. 7 Q. B. 666	162	
Pickard v. Sears	(1837)	6 A. & E. 469	164	
Pickering v. Busk	(1812)	15 East, 38	333, 344	
Pickering v. Ilfracombe Railway ..	(1868)	L. R. 3 C. P. 250	207	
Pigot's Case	(1614)	11 Co. Rep. 27(b)	206	
Pike v. Fitz Gibbon	(1881)	17 Ch. D. 459	123	
Pillans v. Van Mierop	(1765)	3 Burr. 1663	48, 75	
Pinnel's Case	(1602)	5 Co. Rep. 117	87	
Planché v. Colburn	(1831)	8 Bing. 14	289, 294	
Polhill v. Walter	(1832)	3 B. & Ad. 114	144, 172, 348,	
Potter v. Duffield	(1874)	18 Eq. 4	66	
Poulton v. Lattimore	(1829)	9 B. & C. 259	302	
Powles v. Innes	(1843)	11 M. & W. 10	235	
Price v. Easton	(1833)	4 B. & Ad. 433	228	
Priestly v. Fernie	(1865)	3 H. & C. 984	352	
Printing Co. v. Sampson	(1875)	19 Eq. 462	196	
Prosser v. Edmonds	(1835)	1 Y. & C. 499	201	
Protector Loan Co. v. Grice	(1880)	5 Q. B. D. (C. A.) 592	271	
Pust v. Dowie	(1863)	32 L. J. Q. B. 179	307	
Pyke's Case	(1878)	8 Ch. D. 756	210	
Pym v. Campbell	(1856)	6 E. & B. 370	260, 261	
R.				
Raffles v. Wichelhaus	(1864)	2 H. & C. 906	135	
Ramsgate Hotel Co. v. Montefiore ..	(1866)	L. R. 1 Exch. 109	30	
Rann v. Hughes	(1778)	7 T. R. 350	48, 61, 75, 105	
Rannie v. Irwine	(1844)	7 M. & G. 969	203	
Read v. Anderson	(1882)	{ 10 Q. B. D. 100 } 210, 216 13 Q. B. D. (C. A.) 779 } 357, 358		
Reader v. Kingham	(1862)	13 C. B., N. S. 344	61	
Redgrave v. Hurd	(1881)	20 Ch. D. 1	154, 159	
Reese River Mining Co. v. Smith ..	(1869)	L. R. 4 H. L. 64	145	
Reg. v. Wilson	(1879)	5 Q. B. D. (C. C. R.) 28	112	
Reuss v. Picksley	(1866)	L. R. 1 Exch. 342	65	
Reuter v. Sala	(1879)	4 C. P. D. (C. A.) 249	270	
Reynell v. Sprye	(1852)	1 D. M. & G. 660	217	
Richards v. Delbridge	(1874)	18 Eq. 11	230	
Richards v. London, Brighton, & S. C. Railway Co.	(1849)	7 C. B. 839	305	
Richardson v. Williamson	(1871)	L. R. 6 Q. B. 276	347	

INDEX OF CASES.

xxxiii

CASE.	DATE.	REFERENCE.	*PAGE
Ritchie v. Atkinson	(1808)	10 East, 295	301
River Steamer Co., <i>In re</i>	(1871)	6 Ch. 828	319
Roberts v. Hardy	(1815)	3 M. & S. 533	107
Robinson v. Davison	(1871)	L. R. 6 Exch. 269	325
Robinson v. Harman	(1848)	1 Exch. 855	309, 311
Robinson v. Mollet	(1874)	L. R. 7 H. L. 802	340, 341
Robinson v. Read	(1829)	9 B. & C. 455	284
Robson & Sharpe v. Drummond ..	(1831)	2 B. & A. 303	233, 234
Rogers v. Parry	(1613)	Bulstrode, 136	202
Roper v. Johnson	(1873)	L. R. 8 C. P. 167	311
Roscorla v. Thomas	(1842)	3 Q. B. 234	96
Rossiter v. Miller	(1878)	3 App. Ca. 1124	66
Rotheram Alum Co., <i>In re</i>	(1883)	25 Ch. D. 103	230
Rothschild v. Brookman	(1831)	2 Dow & Cl. 188	340
Rousillon v. Rousillon	(1880)	14 Ch. D. 351	205
Rowntree v. Richardson	(1893)	9 T. L. R. 297	20
Rumball v. Metropolitan Bank ..	(1877)	2 Q. B. D. 194	241
Ryan v. Mutual Tontine Ass. Co.	(1893)	1 Ch. (C. A.) 126	312
Ryder v. Wombwell	(1868)	{ L. R. 3 Exch. 90 } { L. R. 4 Exch. 32 }	 115

S.

Sanderson v. Piper	(1839)	5 Bing. N. C. 425	264
Sard v. Rhodes	(1836)	1 M. & W. 153	284
Sayer v. Wagstaff	(1844)	5 Beav. 423	284
Schmaling v. Thomlinson	(1815)	6 Taunt. 147	226
Schmaltz v. Avery	(1851)	16 Q. B. 655	350
Scotson v. Pegg	(1861)	6 H. & N. 295	91, 92
Scott v. Avery	(1855)	5 H. L. C. 811	200
Scott v. Lifford	(1808)	1 Camp. 246	245
Scott v. Littledale	(1858)	8 E. & B. 815	139
Scott v. Morley	(1887)	20 Q. B. D. (C. A.) 120	126
Seager, <i>In re</i>	(1889)	60 Law Times Reports, 665 ..	118
Seeger v. Duthie	(1860)	8 C. B., N. S. 45	148
Seymour v. Bridge	(1885)	14 Q. B. D. 460	211
Shadwell v. Shadwell	(1860)	9 C. B., N. S. 159	91, 92
Shardlow v. Cotterell	(1881)	20 Ch. D. 90	66
Simpson v. Crippin	(1872)	L. R. 8 Q. B. 14	299
Simpson v. L. & N. W. R. Co. ..	(1870)	1 Q. B. D. 274	311
Skeet v. Lindsay	(1877)	2 Ex. D. 317	320
Slade's Case	(1602)	4 Co. Rep. 92	362
Slater v. Jones	(1873)	L. R. 8 Ex. 193	89
Smart v. Sanders	(1848)	5 B. C. 917	357, 358
Smith v. Chadwick	(1882)	20 Ch. D. 44	170
Smith v. Hughes	(1871)	L. R. 6 Q. B. 597	136, 139, 175
Smith v. Kay	(1859)	7 H. L. C. 779	181
Smith v. King	(1892)	2 Q. B. 547	115
Smith v. Land & House Property Co.	(1884)	28 Ch. D. 7	157
Smith v. Mawhood	(1845)	14 M. & W. 463	185
Smith v. Wilson	(1832)	3 B. & A. 728	265
Smout v. Ilbery	(1843)	10 M. & W. 1	360
Snook v. Watts	(1848)	11 Beav. 107	121
South of Ireland Colliery Co. v. } Waddle	(1868)	L. R. 3. C. P. 469	 58
Southwell v. Bowditch	(1876)	1 C. P. D. (C. A.) 374	345, 349
Spencer's Case	(1583)	1 Sm. L. C. 66, 67	249
Spencer v. Harding	(1870)	L. R. 5 C. P. 561	38
Spiller v. Paris Skating Rink ..	(1878)	7 Ch. D. 368	229
Stamford Banking Co. v. Smith ..	(1892)	1 Q. B. (C. A.) 765	320
Stanley v. Jones	(1831)	7 Bing. 369	201

CASE.	DATE.	REFERENCE.	*PAGE
Startup v. Macdonald	(1843)	6 M. & G. 593	284
Stewart v. Casey	(1892)	1 Ch. 115	100
Stewart v. Eddowes	(1874)	L. R. 9 C. P. 314	65
Stilk v. Myrick	(1809)	2 Camp. 317	86
Stockport Waterworks Co. v. Potter	(1864)	3 H. & C. 300	251
Stocks v. Dobson	(1853)	4 D. M. & G. 15	237
Street v. Blay	(1831)	2 B. & A. 456	303, 306
Strickland v. Turner	(1852)	7 Exch. 208	321
Suffell v. Bank of England	(1882)	9 Q. B. D. 555	327
Sullivan v. Mitcalfe	(1880)	5 C. P. D. (C. A.) 455	161
Sutton & Co. v. Grey	(1894)	1 Q. B. 285	61
Synge v. Synge	(1894)	1 Q. B. 466	15, 86, 293

T.

Tailby v. Official Receiver	(1888)	13 App. Ca. 543	236, 239
Tamplin v. James	(1880)	15 Ch. D. 221	140
Tarrabochia v. Hickie	(1856)	1 H. & N. 183	148
Tatam v. Reeve	(1893)	1 Q. B. 44	191
Tate v. Williamson	(1866)	2 Ch. 55	181
Taylor v. Best	(1854)	14 C. B. 487	107
Taylor v. Bowers	(1876)	1 Q. B. D. (C. A.) 3	218
Taylor v. Brewer	(1813)	1 M. & S. 290	41, 81
Taylor v. Caldwell	(1863)	3 B. & S. 826	324
Taylor v. Laird	(1856)	25 L. J. Ex. 329	18, 93
Temperton v. Russell	(1893)	1 Q. B. (C. A.) 435	231
Temperton v. Russell	(1893)	1 Q. B. (C. A.) 715	227
Thacker v. Hardy	(1878)	4 Q. B. D. 685	193
Thatcher v. England	(1847)	3 C. B. 254	38
Thiis v. Byers	(1876)	1 Q. B. D. 244	323
Thomas v. Hayward	(1869)	L. R. 4 Exch. 311	250
Thomas v. Thomas	(1842)	2 Q. B. 851	78
Thomson v. Davenport	(1829)	9 B. & C. 78	349
Thorne v. Deas		4 Johnson (N. Y.) 84	85
Thornett v. Haines	(1846)	15 M. & W. 367	39
Thornhill v. Neats	(1860)	8 C. B., N. S. 831	276
Thoroughgood's Case	(1584)	2 Co. Rep. 9	130
Thomkinson v. Balkis Co.	(1891)	2 Q. B. 614	165
Touche v. Metrop. Warehousing Co.	(1871)	6 Ch. 671	229
Townson v. Tickell	(1819)	3 B. & Ald. 37	13
Truman v. Fenton	(1777)	2 Cowp. 544	103
Trueman v. Loder	(1840)	11 A. & E. 589	66, 351
Tulk v. Moxhay	(1848)	2 Ph. 774	252
Turner v. Owen	(1862)	3 F. & F. 176	86
Tweedle v. Atkinson	(1861)	1 B. & S. 393	80, 223, 229

U.

Udell v. Atherton	(1861)	7 H. & N. 172	353
---------------------------	--------	-----------------------	-----

V.

Valentini v. Canali	(1889)	24 Q. B. D. 166	113
Venezuela Railway Co. v. Kisch ..	(1876)	L. R. 2 H. L. 113	161

W.

Wade v. Simeon	(1846)	2 C. B. 548	83, 86
Wain v. Warlters	(1804)	5 East, 10	67
Wake v. Harrop	(1861)	6 H. & N. 768	257, 258, 263
Wallis v. Smith	(1882)	21 Ch. D. 257	271

INDEX OF CASES.

XXXV

CASE.	DATE.	REFERENCE.	*PAGE
Walton v. Mascall	(1844)	13 M. & W. 451	285
Ward v. Hobbs	(1878)	4 App. Ca. 14	166, 167
Ward v. Monaghan	(1895)	11 T. L. R. 529	271
Ware v. Chappell	(1849)	Style, 186	297, 298
Warlow v. Harrison	(1858)	1 E. & E. 295	39
Waters v. Tompkins	(1835)	2 C. M. & R. 723	320
Watkins v. Rymill	(1883)	10 Q. B. D. 178	18
Watson, <i>In re</i>	(1886)	18 Q. B. D. 116	335
Watson v. Swann	(1862)	11 C. B., N. S. 764	335
Watson v. Turner	(1767)	Buller, <i>Nisi Prius</i> , 147	100, 102
Watteau v. Fenwick	(1892)	1 Q. B. 346	351
Waugh v. Morris	(1873)	L. R. 8 Q. B. 202	211
Webster v. Cecil	(1861)	30 Beav. 62	140, 266
Week v. Tibold	(1605)	Roll. Abr. p. 6	40
Weir v. Bell	(1878)	3 Ex. D. 243	170
Wells v. Foster	(1841)	8 M. & W. 149	198
Wells v. Mayor of Kingston-upon-Hull	(1875)	L. R. 10 C. P. 402	57
Western Wagon Co. v. West	(1892)	1 Ch. 271	236
Wettenhall v. Wood	(1793)	1 Esp. 16	210
Wheelton v. Hardisty	(1857)	8 E. & B. 232	159
White v. Bluett	(1853)	23 L. J. Exch. 36	81
Whittaker, <i>Ex parte</i>	(1875)	10 Ch. 446	168
Whittaker v. Howe	(1841)	3 Beav. 383	205
Whittingham v. Murdy	(1889)	60 Law Times Rep. 936	114
Whitwood Chemical Co. v. Hardman	(1891)	2 Ch. (C. A.) 428	314
Wigglesworth v. Dallison	(1778)	1 Sm. L. C. 569	265
Wilkinson v. Byers	(1834)	1 A. & E. 106	88
Wilkinson v. Coverdale	(1793)	1 Esp. 75	84, 333
Wilkinson v. Johnson	(1824)	3 B. & C. 428	327
Wilkinson v. Oliveira	(1835)	1 Bing. N. C. 490	97
Williams v. Bayley	(1866)	L. R. 1 H. L. 220	199
Williams v. Carwardine	(1833)	4 B. & A. 621	16, 37
Williams v. Jones	(1845)	13 M. & W. 628	51, 363
Williams v. Jordan	(1877)	6 Ch. D. 517	66
Williams v. Lake	(1859)	2 E. & E. 349	66
Williams v. Moor	(1843)	11 M. & W. 256	103, 108
Williams v. Sorrell	(1799)	4 Vesey, 389	237
Wilson v. Finch-Hatton	(1877)	2 Ex. D. 336	167
Wilson v. Glossop	(1888)	20 Q. B. D. (C. A.) 354	334
Wilson v. Jones	(1867)	L. R. 2 Exch. 132	188
Wilson v. Strugnell	(1881)	7 Q. B. D. 548	218
Wilson v. Tumman	(1843)	6 M. & G. 236	334, 335
Windhill Local Board v. Vint	(1890)	45 Ch. D. (C. A.) 351	200
Wing v. Mill	(1817)	1 B. & Ald. 105	101
Withers v. Reynolds	(1831)	2 B. & A. 882	300
Wolverhampton Rlwy. Co. v. L. & N. W. Rlwy. Co.	(1873)	16 Eq. 439	312
Wood v. Abrey	(1818)	3 Maddock, 423	179
Wolfe v. Horne	(1877)	2 Q. B. D. 355	344

X.

Xenos v. Wickham	(1866)	L. R. 2 H. L. 296	32, 52
--------------------------	--------	-------------------------	--------

Y.

Yeoland's Consols, <i>Re</i>	(1888)	58 Law Times Reports, 922	114
--------------------------------------	--------	---------------------------	-----

SOME ABBREVIATIONS USED IN REFERENCE.

REPORTS.¹

A. & E. . . .	Adolphus and Ellis	Q. B. 1834-1841
B. & Ad. . . .	Barnwall and Adolphus	K. B. 1830-1834
B. & Ald. . . .	Barnwall and Alderson	K. B. 1817-1822
B. & C.	Barnwall and Cresswell	K. B. 1822-1830
B. & P.	Bosanquet and Puller	C. P. 1796-1804
Beav.	Beavan	Rolls Court, 1838-1866
B. & S.	Best and Smith	Q. B. 1861-1865
Bing.	Bingham	} C. P. 1824-1840
Bing. N. C. . . .	Bingham's New Cases	
Burr.	Burrows	K. B. 1756-1772
Camp.	Campbell	K. B. & C. P. nisi prius, 1807-1818
C. B.	Common Bench	} C. P. 1845-1865
C. B., N. S. . . .	Common Bench, New Series	
Cl. & F.	Clark & Finely	House of Lords, 1831-1846
C. & M.	Crompton and Meeson	} Ex. 1834-1836
C. M. & R.	Crompton, Messon, and Roscoe	
Co. Rep.	Coke's Reports	Eliz. and James
Cowp.	Cowper	K. B. 1774-1778
Cro. Eliz. or 1 Cro.	Croke, of the reign of Elizabeth	
Cro. Jac. or 2 Cro.	" James	
D. & J.	De Gex and Jones	Ch. App. 1857-1859
D. F. & J.	De Gex, Fisher, and Jones	" 1859-1862
D. M. & G.	De Gex, Macnaghten, and Gordon	" 1851-1857
Dow. & Cl.	Dow and Clark	House of Lords, 1827-1832
Dr. & Sm.	Drewry and Smale	V. C. Kindersley, 1859-1866
Dr. & War.	Drury and Warren	Chancery, 1841-1843
E. & B.	Ellis and Blackburn	Q. B. 1852-1858
E. & E.	Ellis and Ellis	Q. B. 1859-1861
Esp.	Espinasse	K. B. & C. P. nisi prius, 1793-1806
Exch.	Exchequer	1847-1856
F. & F.	Foster and Finlason	Cases at Nisi Prius, 1856-1867
H. Bl.	Henry Blackstone	C. P. 1786-1788
H. L. C.	House of Lords Cases	1846-1866
H. & C.	Hurlstone and Coltman	Ex. 1862-1865
H. & N.	Hurlstone and Norman	Ex. 1856-1862
Ir. C. L.	Irish Common Law Reports	
J. & H.	Johnson and Hemming	V. C. Page Wood, 1859-1862

¹ References to the Law Journal reports have not been given throughout the ensuing pages because the system of marginal references imposed certain limits as to space. The reports cited are accessible to any student at Oxford, and it is hoped that the information given as to the court in which the case was decided, and the date of the report to which reference is made, will enable those who can only refer to the Law Journal to discover the cases with little difficulty.

K. & J.	Kay and Johnson	V. C. Page Wood, 1854-1856
L. J. Exch.	Law Journal Exchequer	
L. J. Q. B.	“ “ Queen’s Bench	} 1828-
L. J. Ch.	“ “ Chancery	
L. T. R.	Law Times Reports.	
Lev.	Levinz	K. B. & C. P. 1660-1696
Mad.	Maddock	Vice-Chancellor’s Court 1817-1829
M. & G.	Manning and Granger	C. P. 1840-1845
M. & S.	Maule and Selwyn	K. B. 1813-1817
M. & W.	Meeson and Welsby	Ex. 1836-1847
Mer.	Merivale	Chancery, 1813-1817
Mod. Rep.	Modern Reports Common Law and Chancery,	1660-1702
M. & K.	Mylne and Keen	Chancery, 1832-1837
Ph.	Phillips	“ 1841-1849
Q. B.	Queen’s Bench	 1841-1852
Rep. in Ch.	Reports in Chancery	 1625-1688
Rolle Abr.	Rolle’s Abridgment	 1614-1625
Russ.	Russell	Chancery, 1826-1829
R. & M.	Russell and Mylne	 1829-1831
Salk.	Salkeld	K. B. C. P. Ch. & Ex. 1689-1712
Sch. & L.	Schoales and Lefroy	Irish Chancery, 1802-1806
Sid.	Siderfin	K. B. C. P. & Exch. 1657-1670
Sm. L. C.	Smith’s Leading Cases.	
Str.	Strange	 1727-1784
Taunt.	Taunton	 C. P. 1807-1819
T. R.	{ Term Reports, or Durnford } and East’s Reports	
T. L. R.	Times Law Reports	 1884-
Ventr.	Ventris	 K. B. 1660-1685
Vern.	Vernon	Chancery, 1680-1718
Ves.	Vesey Junior	Chancery, 1789-1816
Ves. Senr.	Vesey Senior	Chancery, 1746-1755
Y. & C.	Young and Collyer	V. C. Knight-Bruce, 1834-1842
Yelv.	Yelverton	 K. B. 1601-1613

LAW REPORTS, 1865-1893.

L. R. Q. B.	Queen’s Bench	} 1865-1875
L. R. C. P.	Common Pleas	
L. R. Ex.	Exchequer	
Eq.	Equity	
Ch.	Chancery Appeals	}
L. R. H. L.	House of Lords { English and Irish Appeals	
L. R. Sc. App.	Scotch Appeals	
Q. B. D.	Queen’s Bench Division	1875-1891
C. P. D.	Common Pleas Division	} . . 1875-1891
Ex. D.	Exchequer Division	
Ch. D.	Chancery Division	} 1875-1891
App. Ca.	House of Lords and Privy Council Appeal Cases	
(189-) Q. B.	Queen’s Bench Division	. . 1891-
(189-) Ch.	Chancery Division	. . 1891-
(189-) A. C.	House of Lords and Privy Council Appeal Cases . .	1891-

TABLE OF AMERICAN CASES.

A.

						PAGE
Ackert v. Barker	..	..	131 Mass.	436	..	247
Adams v. Gay	..	..	19 Vt.	358	..	228
Adams v. Irving Nat. Bk.	..	..	116 N. Y.	606	..	218
Adams v. Messinger	..	..	147 Mass.	185	..	96, 396
Adams &c. Works v. Schnader,	..	..	155 Pa. St.	394	..	342, 348
Ahearn v. Ayres	..	..	38 Mich.	692	..	47
Albany City Sav. Inst. v. Burdick,	..	..	87 N. Y.	40	..	215
Alden v. Thurber	..	..	149 Mass.	271	..	105, 334, 384
Alexander v. Morgan	..	..	31 Oh. St.	546	..	310
Allen v. Baker	..	..	86 N. C.	91	..	395
Allen v. Brown	..	..	44 N. Y.	228	..	294
Allen v. Bryson	..	..	67 Iowa,	591	..	115, 120
Allen v. Collier	..	..	70 Mo.	138	..	389
Allen v. Duffie	..	..	43 Mich.	1	..	228
Allen v. Hammond	..	..	11 Pet. (U. S.)	63	..	167
Aller v. Aller	..	..	40 N. J. L.	446	..	64
Allison v. Chandler	..	..	11 Mich.	542	..	377
Alvord v. Smith	..	..	63 Ind.	58	..	229
Anderson v. May	..	..	50 Minn.	280	..	158, 391
Anderson v. Roberts	..	..	18 Johns. (N. Y.)	515	..	272
Anderson v. Soward	..	..	40 Oh. St.	325	..	135
Anderson v. Spence	..	..	72 Ind.	315	..	71
Andrew v. Dyer	..	..	81 Me.	104	..	321
Angle v. Chicago &c. Ry.	..	..	151 U. S.	1	..	279
Appleton Bank v. McGilvray	..	..	4 Gray (Mass.),	518	..	441
Arkansas Valley Smelting Co. } v. Belden Mining Co.	..	..	127 U. S.	379	..	288
Armstrong v. Levan	..	..	109 Pa. St.	177	..	388
Arnold v. Richmond Iron Works,	..	..	1 Gray (Mass.),	434	..	148
Ashcroft v. Butterworth	..	..	136 Mass.	511	..	47
Ashley v. Dixon	..	..	48 N. Y.	430	..	279
Askey v. Williams	..	..	74 Tex.	294	..	140
Atwood v. Chapman	..	..	68 Me.	38	..	203
Auditor v. Ballard	..	..	9 Bush. (Ky.)	572	..	20
Auerbach v. Le Sueur Mill Co.,	..	..	28 Minn.	291	..	145
Aultman v. Kennedy	..	..	33 Minn.	339	..	115
Ayer v. Kilner	..	..	148 Mass.	468	..	338

B.

Babcock v. Hawkins	..	..	23 Vt.	561	..	384
Bach v. Tuch	..	..	126 N. Y.	53	..	217
Bagley v. Cleveland Rolling Mill Co.,	..	..	21 Fed. Rep.	159	..	168, 184
Bailey v. Austrian	..	..	19 Minn.	535	..	36
Bailey v. Bussing	..	..	28 Conn.	455	..	439

						PAGE
Baker v. Burton	..	..	31 Fed. Rep. 401	..	..	227
Baker v. Holt	..	..	56 Wis. 100	..	..	49
Baldwin v. Barrows	..	..	86 Ind. 351	..	..	161
Billou v. Earle	..	..	17 R. I. 441	..	..	22
Baltzen v. Nicolay	..	..	53 N. Y. 467	..	..	200, 421
Bank v. Johns	..	..	22 W. Va. 520	..	..	161
Bank v. Railroad Co.	..	..	5 S. C. 156	..	..	145
Bank of Columbia v. Patterson,	..	..	7 Cranch (U. S.), 299	..	..	67, 144
Bardwell v. Purrington	..	..	107 Mass. 419	..	..	131
Barker v. Dunsmore	..	..	72 Pa. St. 427	..	..	165, 217, 272
Barker v. Hibbard	..	..	54 N. H. 539	..	..	140
Barnes v. Shoemaker	..	..	112 Ind. 512	..	..	163
Barney v. Forbes	..	..	118 N. Y. 580	..	..	79
Barrett v. Buxton	..	..	2 Aik. (Vt.) 167	..	..	148
Barrie v. Earle	..	..	143 Mass. 1	..	..	365
Bartholomew v. Jackson	..	..	20 Johns. (N. Y.) 28	..	..	20, 113
Barton v. Capron	..	..	3 R. I. 171	..	..	166
Bassett v. Brown	..	..	105 Mass. 551	..	..	217
Bassett v. Hughes	..	..	53 Wis. 319	..	..	281
Basye v. Adams	..	..	81 Ky. 368	..	..	239
Bauer v. Samson Lodge	..	..	102 Ind. 262	..	..	246
Bay v. Coddington	..	..	20 Johns. (N. Y.) 637	..	..	128
Bayne v. Wiggins	..	..	139 U. S. 210	..	..	77
Beach v. First M. E. Church	..	..	96 Ill. 177	..	..	32
Beardsley v. Duntley	..	..	69 N. Y. 577	..	..	82
Beardsley v. Hotchkiss	..	..	96 N. Y. 201	..	..	134
Beck &c. Co. v. Colorado &c. Co.,	{	{	10 U. S. App. 465 S. C. 52 Fed. Rep. 700	..	..	329
Bedell v. Wilder	..	..	65 Vt. 406	..	..	167
Beebe v. Johnson	..	..	19 Wend. (N. Y.) 500	..	..	96
Beeman v. Banta	..	..	118 N. Y. 538	..	..	377
Bellows v. Sowles	..	..	57 Vt. 164	..	..	70, 99, 106
Bell's Gap R. R. v. Christy	..	..	79 Pa. St. 54	..	..	407
Bender v. Been	..	..	78 Iowa, 283	..	..	105
Beninger v. Corwin	..	..	24 N. J. L. 257	..	..	204
Benjamin v. Dockham	..	..	134 Mass. 418	..	..	405
Bennett v. Mattingly	..	..	110 Ind. 197	..	..	272
Bernard v. Taylor	..	..	23 Ore. 416	..	..	232, 235, 269, 270
Bethell v. Bethell	..	..	92 Ind. 318	..	..	207
Beymer v. Bonsall	..	..	79 Pa. St. 298	..	..	426
Bibb v. Allen	..	..	149 U. S. 481	..	..	409
Bigelow v. Benedict	..	..	70 N. Y. 202	..	..	237
Bird v. Munroe	..	..	66 Me. 337	..	..	76, 88
Birdsall v. Russell	..	..	29 N. H. 220	..	..	397
Bisbee v. McAllen	..	..	39 Minn. 143	..	..	227
Bishop v. Palmer	..	..	146 Mass. 469	..	..	255
Bixby v. Dunlap	..	..	56 N. Y. 456	..	..	279
Bixby v. Moor	..	..	51 N. H. 402	..	..	17, 255
Blade v. Noland	..	..	12 Wend. (N. Y.) 173	..	..	398
Blæchinska v. Howard Mission,	..	..	130 N. Y. 497	..	..	154
Blaisdell v. Ahern	..	..	144 Mass. 393	..	..	248
Blake v. Voigt	..	..	134 N. Y. 69	..	..	75
Blakeman v. Fonda	..	..	41 Conn. 561	..	..	389
Blaskower v. Steel	..	..	23 Ore. 106	..	..	389
Blewett v. Boorum	..	..	142 N. Y. 357	..	..	319
Bloss v. Kittridge	..	..	5 Vt. 28	..	..	115
Blossom v. Dodd	..	..	43 N. Y. 264	..	..	22
Bohonan v. Pope	..	..	42 Me. 93	..	..	282
Boigneres v. Boulon	..	..	54 Cal. 146	..	..	112, 248
Bollman v. Burt	..	..	61 Md. 415	..	..	366
Boothe v. Fitzpatrick	..	..	36 Vt. 681	..	..	120

				PAGE
Borcherling v. Katz	37 N. J. Eq. 150	420		
Borden v. Boardman	157 Mass. 410	280		
Boston v. Farr	148 Pa. St. 220	72		
Boston v. Simmons	150 Mass. 461	410		
Boston Ice Co. v. Potter	123 Mass. 28	163		
Boston &c. R. v. Bartlett	3 Cush. (Mass.) 224	34, 39		
Bourlier Brothers v. Macauley, ...	91 Ky. 135	279		
Bowery Nat. Bk. v. Wilson	122 N. Y. 478	245		
Bowker v. Hoyt	18 Pick. (Mass.) 555	113		
Boyden v. Boyden	9 Met. (Mass.) 519	134		
Boyer v. Berryman	123 Ind. 451	148		
Boylan v. Hot Springs R.	132 U. S. 146	22		
Boyle v. Adams	50 Minn. 255	244		
Boyson v. Thorn	98 Calif. 578	279		
Bradshaw v. Combs	102 Ill. 428	320		
Bragg v. Danielson	141 Mass. 195	335		
Brauer v. Campana Navigacion }	66 Fed. Rep. 776	340		
La Flesha				
Braunn v. Keally	146 Pa. St. 519	227		
Brewster v. Hetch	122 N. Y. 349	198, 199		
Brick v. Gannor	36 Hun (N. Y.), 62	75		
Brick Co. v. Pond	38 Oh. St. 65	391		
Bridges v. Bidwell	20 Neb. 185	121		
Briggs v. Holmes	118 Pa. St. 283	346		
Briggs v. Partridge	64 N. Y. 357	62, 420		
Brigham v. Fayerweather	144 Mass. 48	147		
Britton v. Turner	6 N. H. 481	374		
Brodrub v. Brodrub	56 Cal. 563	147		
Brooks v. Ball	18 Johns. (N. Y.) 337	8, 90		
Brooks v. Cooper	50 N. J. Eq. 761	244		
Brown v. Eastern R.	11 Cush. (Mass.) 97	22		
Brown v. Farmers' Loan & Trust Co., ...	117 N. Y. 266	80, 86		
Brown v. Foster	113 Mass. 136	348		
Brown v. Kinsey	81 N. C. 245	64, 248, 262		
Brown v. Montgomery	20 N. Y. 287	203		
Brown v. Pierce	7 Wall. (U. S.) 205	218		
Brown v. Sanborn	21 Minn. 402	87		
Brown v. Tuttle	80 Me. 162	248		
Browning v. Parker	17 R. I. 183	80		
Brownlee v. Lowe	117 Ind. 420	111		
Brunswick Gas Light Co. v. United }	85 Me. 532	146		
Gas, Fuel & Light Co.				
Brusie v. Peck Bros. & Co.	14 U. S. App. 21	362		
Bryan v. Watson	127 Ind. 42	228		
Bryant v. Isburgh	13 Gray (Mass.), 607	368		
Buchanan v. Ins. Co.	6 Cow. (N. Y.) 318	238		
Buckley v. Humason	50 Minn. 195	227		
Bulkley v. Devine	127 Ill. 406	321		
Bull v. Talcot	2 Root (Conn.), 119	46		
Bullitt v. Farrar	42 Minn. 8	178		
Burdett v. Williams	30 Fed. Rep. 697	135		
Burnet v. Bisco	4 Johns. (N. Y.) 235	89		
Burnham v. Kidwell	113 Ill. 425	147		
Burns v. Real Estate Co.	52 Minn. 31	343		
Burr v. Beers	24 N. Y. 178	281		
Burrell v. Highleyman	33 Mo. App. 183	87		
Burritt v. Saratoga Ins. Co.	5 Hill (N. Y.), 188	193		
Burson v. Huntington	21 Mich. 415	162		
Burton v. Larkin	36 Kans. 246	281		
Bush v. Breinig	113 Pa. St. 310	148		
Butler v. Maples	9 Wall. (U. S.) 766	416		

				PAGE
Butterfield v. Byron	153 Mass. 517	391		
Byington v. Simpson	134 Mass. 169	321, 422, 423, 425		

C.

Caldwell v. School Dist. ..	55 Fed. Rep. 372	97		
Campbell v. Holt	115 U. S. 620	386		
Campbell v. Richardson ..	10 Johns. (N. Y.) 406 ..	232		
Canajoharie Nat. Bk. v. Diefendorf,	123 N. Y. 191	299		
Canal Co. v. Ray	101 U. S. 522	342		
Carew v. Rutherford	106 Mass. 1	440		
Carpenter v. Rodgers	61 Mich. 384	148		
Carson v. Clark	2 Ill. 113	121		
Carter v. Beckwith	128 N. Y. 312	147, 148		
Carter v. United Ins. Co. ..	1 Johns. Ch. (N. Y.) 463	291		
Catlin v. Tobias	26 N. Y. 217	374		
Central Shade Roller Co. v. Cushman	143 Mass. 353	253		
Central Trans. Co. v. Pullman Car Co.	139 U. S. 24	68, 146		
Chaffee v. Thomas	7 Cow. (N. Y.) 358	120		
Chambers v. Baldwin	91 Ky. 121	279		
Chapin v. Dobson	78 N. Y. 74	320		
Chapman v. Cole	12 Gray (Mass.), 141 ..	167, 169		
Chapman v. Rose	56 N. Y. 137	161		
Chase v. Fitz	132 Mass. 359	311		
Chatham Furnace Co. v. Moffatt,	147 Mass. 403	178, 208		
Chaude v. Shepard	122 N. Y. 397	330		
Cheltenham &c. Co. v. Gates Iron Works	124 Ill. 623	346		
Cheveront v. Textar	53 Md. 295	240		
Chicago v. Tilley	103 U. S. 146	358		
Chipley v. Atkinson	23 Fla. 206	279		
Christian Church v. Johnson ..	53 Ind. 273	68		
Christian College v. Hendley,	49 Cal. 347	109		
Churchill v. Bradley	58 Vt. 403	91		
Cicotte v. Church of St. Anne,	60 Mich. 552	17		
Claffin v. Lenheim	66 N. Y. 301	432		
Claffin v. Ostrom	54 N. Y. 581	281		
Clapp v. Lawton	31 Conn. 95	281		
Clark v. Allen	11 R. I. 439	239		
Clark v. Coffin Co.	125 Ind. 277	321		
Clark v. Davidson	53 Wis. 317	121		
Clark v. Ins. Co.	8 How. (U. S.) 235	193		
Clark v. Marsiglia	1 Denio (N. Y.), 317 ..	353, 357, 378		
Clark v. Randall	9 Wis. 135	114		
Clark v. Van Court	100 Ind. 113	135		
Clason v. Bailey	14 Johns. (N. Y.) 484 ..	76		
Cleary v. Sohler	120 Mass. 210	394		
Clemans v. Supreme Assembly &c.,	131 N. Y. 485	195		
Clifton v. Jackson Iron Co. ..	74 Mich. 183	62, 396		
Cline v. Templeton	78 Ky. 550	98		
Clodfelter v. Cox	1 Sneed (Tenn.), 330 ..	293		
Clough v. Seay	49 Iowa, 111	397		
Cobb v. Knapp	71 N. Y. 348	426		
Coe v. Tough	116 N. Y. 273	317		
Colby v. Dearborn	59 N. H. 326	317		
Cole v. Hughes	54 N. Y. 444	308		
Coleman v. Applegarth	68 Md. 21	42, 329		
Collier v. Baptist Ed. Soc. ..	8 B. Mon. (Ky.) 68	109		
Collyer v. Moulton	9 R. I. 90	105, 334, 338, 383		

TABLE OF AMERICAN CASES.

xliii

		PAGE
Combs v. Harshaw	63 N. C. 198	73
Commonwealth v. Emigrant Bank,	98 Mass. 12	397
Commonwealth v. Pittsburgh,	41 Pa. St. 278	145
Conduitt v. Ross	102 Ind. 106	308
Conlan v. Roemer	52 N. J. L. 53	206
Connelly v. Devoe	37 Conn. 570	102
Connor v. Stanley	72 Cal. 556	223
Conover v. Stillwell	34 N. J. L. 54	89
Constant v. University of Rochester,	111 N. Y. 604	429
Continental Ins. Co. v. Kasey,	25 Gratt. (Va.) 268	193
Cook v. Bradley	7 Conn. 57	55, 88, 89, 94
Cook v. Chicago R.	81 Iowa, 551	440
Cook v. Doggett	2 Allen (Mass.), 439	121
Cooke v. Millard	65 N. Y. 352	87
Cooke v. Nathan	16 Barb. (N. Y.) 342	207
Cooke v. Orn	37 Ill. 186	28
Cooper v. Kane	19 Wend. (N. Y.) 386	324
Cooper v. Lansing Wheel Co.,	94 Mich. 272	34, 36
Copenrath v. Kienby	83 Ind. 18	147
Coplay Iron Co. v. Pope	108 N. Y. 232	184, 368
Cordes v. Miller	39 Mich. 581	393
Cort v. Lassard	18 Ore. 221	381
Costello v. Ten Eyck	86 Mich. 348	228
Cothéal v. Talmage	9 N. Y. 551	331
Cottage St. Ch. v. Kendall	121 Mass. 528	109
Cowee v. Cornell	75 N. Y. 91	223
Cowley v. Dobbins	136 Mass. 401	208
Cowley v. Smyth	46 N. J. L. 380	176, 207
Coyner v. Lynde	10 Ind. 282	103
Crafton v. Cummings	99 U. S. 100	77
Crane v. Powell	139 N. Y. 379	80
Cranson v. Goss	107 Mass. 439	228, 265
Crawford v. Chapman	17 Oh. St. 449	307
Crawford v. Millsbaugh	13 Johns. (N. Y.) 87	335
Crawford v. Scovell	94 Pa. St. 48	147
Crawford v. The William Penn.,	3 Wash. C. C. (U. S.) 484	129
Cream City Glass Co. v. Friedlander,	84 Wis. 53	422
Crittenden v. Fiske	46 Mich. 70	28
Cromwell v. Tate's Ex'r	7 Leigh (Va.), 301	60
Crooks v. Nippolt	44 Minn. 239	217
Cross v. Cross	58 N. H. 373	249
Crouch v. Gutmann	134 N. Y. 45	348
Croyle v. Moses	90 Pa. St. 250	203
Crumlish's Adm'r v. Central } Improvement Co.	38 W. Va. 390	276
Cummings v. Arnold	3 Met. (Mass.) 486	343
Cummings v. Cass	52 N. J. L. 77	206
Curry v. Curry	114 Pa. St. 367	17
Curson v. Monteiro	2 Johns. (N. Y.) 308	62
Curtis v. Parks	55 Cal. 106	124
Cushing v. Arnold	9 Met. (Mass.) 23	58
Cutter v. Cochrane	116 Mass. 408	105

D.

Da Lee v. Blackburn	11 Kans. 190	176
Daly v. Smith	49 How. Pr. (N. Y.) 150	381
Daniels v. Newton	114 Mass. 530	353
Darrow v. Horne Produce Co.,	57 Fed. Rep. 463	418
Dartmouth College v. Woodward,	4 Wheat. (U. S.) 518, 656	11
Davenport v. First Cong. Soc.,	33 Wis. 387	111

					PAGE
Davis v. Bronson	..	..	2 N. Dak. 300	..	353, 355, 357
Davis v. Hamlin	..	..	108 Ill. 39	..	411
Davis v. Lane	..	..	10 N. H. 156	..	434
Davis v. Nuzum	..	..	72 Wis. 439	..	177, 208
Davis v. Tift	..	..	70 Ga. 52	..	79
Davis v. Wells	..	..	104 U. S. 159	..	27, 28
Davis &c. Co. v. Jones	..	..	61 Mo. 409	..	27
Davison v. Von Lingen	..	..	113 U. S. 40	..	182, 329, 352, 370
Dawe v. Morris	..	..	149 Mass. 188	..	206
Dawkins v. Sappington	..	..	26 Ind. 199	..	20, 44
Day v. Caton	..	..	119 Mass. 513	..	15, 17
Day v. McAllister	..	..	15 Gray (Mass.), 433	..	228
Dean v. Emerson	..	..	102 Mass. 480	..	255
Dean v. Walker	..	..	107 Ill. 540	..	281
Dearborn v. Bowman	..	..	3 Met. (Mass.) 155	..	115
De Camp v. Harma	..	..	29 Oh. St. 467	..	161
Decell v. Lewenthal	..	..	57 Miss. 331	..	141, 142
Decosta v. Davis	..	..	24 N. J. L. 319	..	81
Delier v. Plymouth &c. Soc.	..	..	57 Iowa, 481	..	229
Denny v. Williams	..	..	5 Allen (Mass.), 7	..	81
Denver Fire Ins. Co. v. McClelland,	..	..	9 Colo. 11	..	146
Derby v. Johnson	..	..	21 Vt. 17	..	352, 357
Dermott v. Jones	..	..	2 Wall. (U. S.) 1	..	352, 374, 391
Detroit Stove Works v. Perry,	..	..	7 Fed. Cas. 555	..	327
Dettra v. Kestner	..	..	147 Pa. St. 566	..	217
Devecmon v. Shaw	..	..	69 Md. 199	..	90
Devlin v. Mayor	..	..	63 N. Y. 8	..	288
Devoe v. Brandt	..	..	53 N. Y. 462	..	206
Dewey v. Union School Dist. &c.,	..	..	43 Mich. 480	..	395
Dexter v. Hall	..	..	15 Wall. (U. S.) 9	..	147
Dexter v. Norton	..	..	47 N. Y. 62	..	394
Diamond Match Co. v. Roeber,	..	..	106 N. Y. 473	..	252
Dickinson v. Calahan's Adm'rs,	..	..	19 Pa. St. 227	..	310
Dillon v. Anderson	..	..	43 N. Y. 231	..	353
Dingley v. Oler	..	..	117 U. S. 490	..	355
Dodge v. Emerson	..	..	131 Mass. 467	..	346
Dodge v. Stiles	..	..	26 Conn. 463	..	102
Doggett v. Emerson	..	..	{ 3 Story (U. S. C. C.), 700; S. C. 7 Fed. Cas. 804	..	190
Doherty v. Hill	..	..	144 Mass. 465	..	77
Dorr v. Fisher	..	..	1 Cush. (Mass.) 271	..	183
Doty v. Wilson	..	..	14 Johns. (N. Y.) 378	..	120, 124
Douglass v. Snow	..	..	77 Me. 91	..	82
Downer v. Chesebrough	..	..	36 Conn. 39	..	81
Drake v. Seaman	..	..	97 N. Y. 230	..	79
Drummond v. Crane	..	..	159 Mass. 577	..	310
Duffany v. Ferguson	..	..	66 N. Y. 482	..	207
Duffy v. Wunsch	..	..	42 N. Y. 243	..	73
Dulaney v. Rogers	..	..	64 Mo. 201	..	208
Dun v. City Nat. Bk.	..	..	58 Fed. Rep. 174	..	277
Duncan v. Baker	..	..	21 Kans. 99	..	374
Duncan v. Miller	..	..	64 Iowa, 223	..	128
Duncan v. New York Mut. Ins. Co.,	..	..	138 N. Y. 88	..	167
Dunham v. Griswold	..	..	100 N. Y. 224	..	439
Dunne v. Herrick	..	..	37 Ill. App. 180	..	248
Dunphy v. Ryan	..	..	116 U. S. 491	..	80
Duplex Safety Boiler Co. v. Garden,	..	..	101 N. Y. 387	..	93, 348
Durnherr v. Rau	..	..	135 N. Y. 219	..	281
Dusenbury v. Hoyt	..	..	53 N. Y. 521	..	124
Dusenbury v. Speir	..	..	77 N. Y. 144	..	10, 436
Duval v. Wellman	..	..	124 N. Y. 156	..	249, 267, 440

E.

					PAGE
Eastern Township Bank v. Beebe,	53 Vt. 177	..	..	..	58
Eastman v. Wright	6 Pick. (Mass.) 316	..	..	..	2, 7
Eaton v. Avery	83 N. Y. 31	..	..	..	214
Eaton v. Hill	50 N. H. 235	..	..	..	143
Eaton v. Kegan	114 Mass. 433	..	..	..	227
Eden v. Chaffee	160 Mass. 225	..	..	..	72
Edinboro Acad. v. Robinson ..	37 Pa. St. 210	..	..	..	109
Edmonds v. Merchants' &c. Co.,	135 Mass. 283	..	..	164, 165,	272
Edwards v. Nelson	51 Mich. 121	..	..	..	94, 124
Eldred v. Malloy	2 Colo. 320	..	..	..	232
Elizabeth v. Force	29 N. J. Eq. 587	..	..	..	397
Elliott v. Caldwell	43 Minn. 357	..	..	..	348
Elliott v. Horn	10 Ala. 348	..	..	..	121
Ellis v. Harrison	104 Mo. 270	..	..	..	282
Ely v. Hallett	2 Caines' Rep. (N. Y.) 57	..	..	..	192
Embrey v. Jemison	131 U. S. 336	..	..	..	262, 264
Emery v. Cobbe	27 Neb. 621	..	..	..	25
Emery v. Kempton	2 Gray (Mass.), 257	..	..	..	261
Endriss v. Belle Isle Co. ..	49 Mich. 229	..	..	..	103
English v. Spokane Comm. Co.,	57 Fed. Rep. 451	..	..	..	368
Epperson v. Nugent	57 Miss. 45	..	..	..	140
Erie Railway Co. v. Union Loc. } and Exp. Co.	35 N. J. L. 240	..	..	..	255
Ernst v. Crosby	140 N. Y. 364	..	..	..	248, 257
Erwin v. Parham	12 How. (U. S.) 197	..	..	..	92
Ewell v. Daggs	108 U. S. 143	..	..	..	272
Exchange Bank v. Rice	107 Mass. 37	..	..	..	280
Exchange Nat. Bk. v. Third Nat. Bk.,	112 U. S. 276	..	..	..	277, 414
Exhaust Ventilator Co. v. Chicago } &c. Ry.	66 Wis. 218	..	..	..	348

F.

Fairchild v. King	102 Calif. 320	..	..	..	277
Fairplay School Township v. O'Neal,	127 Ind. 95	..	..	..	48, 97
Farmers' &c. Co. v. Floyd ..	47 Oh. St. 525	..	..	..	200
Farmers' &c. Co. v. Wilson ..	139 N. Y. 284	..	..	..	435
Favor v. Philbrick	7 N. H. 326	..	..	..	260
Fay v. Guynon	131 Mass. 31	..	..	..	289
Fayette County Sav. Bk. v. Steffes,	54 Iowa, 214	..	..	..	161
Fenno v. Weston	31 Vt. 345	..	..	..	49
Fetrow v. Wiseman	40 Ind. 143	..	..	..	121, 135
Field v. Mayor	6 N. Y. 179	..	..	..	291
Fink v. Cox	18 Johns. (N. Y.) 145	..	..	..	94
First N. Bk. v. Yocum	11 Neb. 328	..	..	..	177
Fish v. Cleland	33 Ill. 237	..	..	..	191, 207
Fisher v. Deering	60 Ill. 114	..	..	..	307
Fisher v. Hildreth	117 Mass. 558	..	..	..	270
Fisher v. Seltzer	23 Pa. St. 308	..	..	..	34
Fitch v. Snedaker	38 N. Y. 248	..	..	..	14, 20
Flesh v. Lindsay	115 Mo. 1	..	..	..	149, 402
Fletcher v. Peck	6 Cranch (U. S.), 87	..	..	..	4
Fogg v. Portsmouth Athenæum,	44 N. H. 115	..	..	..	15, 18
Fonseca v. Cunard Steamship Co.,	153 Mass. 553	..	..	..	22
Forbes v. McDonald	54 Cal. 98	..	..	..	244
Ford v. Mitchell	15 Wis. 304	..	..	..	346
Ford v. Phillips	1 Pick. (Mass.) 202	..	..	..	135
Foster v. Metts	55 Miss. 77	..	..	..	98, 99
Fowle v. Park	131 U. S. 88	..	..	..	252
Fowler v. Callan	102 N. Y. 395	..	..	..	248

			PAGE
Fox v. Boston &c. R.	.. ..	148 Mass. 220	377
Fradley v. Hyland	.. ..	37 Fed. Rep. 49	426
Freeman v. Boland	.. ..	14 R. I. 39	9, 143
Freeman v. Freeman	.. ..	43 N. Y. 34	380
Freyman v. Knecht	.. ..	78 Pa. St. 141	368
Fuller v. Rice	.. ..	52 Mich. 435	374
Funk v. Hough	.. ..	29 Ill. 145	92

G.

Gaines's Adm'r v. Poor	.. ..	3 Metc. (Ky.) 503	150
Gamewell Fire Alarm Tel. Co. v. Crane	.. ..	160 Mass. 50	252
Ganson v. Madigan	.. ..	15 Wis. 144	322, 323
Ganson v. Madigan	.. ..	13 Wis. 67	339
Gardner v. Gardner	.. ..	5 Cush. (Mass.) 483	403
Gardner v. Ogden	.. ..	22 N. Y. 327	411
Gardner v. Tatum	.. ..	81 Cal. 370	227
Gavagan v. Bryant	.. ..	83 Ill. 376	161
Geiger v. Western Maryland R.,	.. ..	41 Md. 4	342
Geisinger v. Beyl	.. ..	80 Wis. 443	411
Geismer v. Lake Shore &c. R.,	.. ..	102 N. Y. 563	392
Gelpcke v. Dubuque	.. ..	1 Wall. (U. S.) 221	255
Gerlie v. Poidebard Silk Mfg. Co. (N. J.)	.. ..	31 Atl. Rep. 401	365
Gibbs v. Consolidated Gas Co.,	.. ..	130 U. S. 396	253
Gibbs v. Linabury	.. ..	22 Mich. 479	161
Gibney v. Curtis	.. ..	61 Md. 192	366
Gibson v. Pelkie	.. ..	37 Mich. 380	167, 174
Gifford v. Corrigan	.. ..	117 N. Y. 257	281
Gill v. Johnstown Lumber Co.,	.. ..	151 Pa. St. 534	365, 366
Gillespie v. Moon	.. ..	2 Johns. Ch. (N. Y.) 585	325
Gillespie Tool Co. v. Wilson	.. ..	123 Pa. St. 19	348
Gilman v. Lockwood	.. ..	4 Wall. (U. S.) 409	312, 398
Glass v. Hulbert	.. ..	102 Mass. 24	325
Gleason v. Dyke	.. ..	22 Pick. (Mass.) 390	120, 124
Glenn v. Farmers' Bank	.. ..	70 N. C. 191	265
Goddard v. Binney	.. ..	115 Mass. 450	87
Goddard v. Monitor Ins. Co.	.. ..	108 Mass. 56	193
Goldsby v. Robertson	.. ..	1 Blackf. (Ind.) 247	120
Good Fellows v. Campbell	.. ..	17 R. I. 402	90
Goodin v. Royl	.. ..	85 Iowa, 592	281, 282
Goodnow v. Bond	.. ..	50 N. H. 150	76
Goodnow v. Empire Lumber Co.,	.. ..	31 Minn. 468	134
Goodsell v. Western Union Tel. Co.,	.. ..	130 N. Y. 430	285
Goodwin v. Bowden	.. ..	54 Me. 424	434
Gordon v. Butler	.. ..	105 U. S. 553	206
Gordon v. George	.. ..	12 Ind. 408	306
Gordon v. Gordon	.. ..	56 N. H. 170	111
Gordon v. Manchester &c. Ry.,	.. ..	52 N. H. 596	46
Gorham's Adm'r v. Meacham's Adm'r	.. ..	63 Vt. 231	2, 7, 60
Gottschalk v. Stein	.. ..	69 Md. 51	379
Gould v. Sternberg	.. ..	128 Ill. 510	385
Goulding v. Davidson	.. ..	26 N. Y. 604	120, 125
Gove v. Island City Co.	.. ..	19 Ore. 363	374
Grady v. American Cent. Ins. Co.,	.. ..	60 Mo. 116	414
Graffam v. Pierce	.. ..	143 Mass. 386	80
Graham v. Meyer	.. ..	99 N. Y. 611	203
Grandin v. Grandin	.. ..	49 N. J. L. 508	99
Grant v. Diebold Safe and Lock Co.,	.. ..	77 Wis. 72	281

				PAGE
Graves v. The Calvin I. Edwards,	50 Fed. Rep. 477	..	..	340
Graves v. Johnson	156 Mass. 211	..	243, 248, 257,	261
Gray v. Barton	55 N. Y. 68	..	..	107
Gray v. Hamil	82 Ga. 375	..	..	94
Gray v. National Benefit Assoc.,	111 Ind. 531	..	..	195
Greene v. Bateman	10 Fed. Cas. 1126	..	..	157
Green v. Batson	71 Wis. 54	..	..	221
Green v. Green	69 N. Y. 553	..	..	134
Greenfield Bank v. Crafts ..	4 Allen (Mass.), 447	..	..	408
Greenwood v. Law	55 N. J. L. 168	..	..	84
Gregory v. Lee	64 Conn. 407	..	131, 140	
Gregory v. Schoenell	55 Ind. 101	..	..	186
Gribben v. Maxwell	34 Kans. 8	..	..	147
Griffiths v. Sears	112 Pa. St. 523	..	..	263
Grigsby v. Stapleton	94 Mo. 423	..	169, 203,	205
Griswold v. Waddington ..	16 Johns. (N. Y.) 438	..	..	129
Grocers' Bank v. Penfield ..	69 N. Y. 502	..	..	302
Grymes v. Sanders	93 U. S. 55	..	..	217
Guelich v. National State Bank,	56 Iowa, 434	..	..	277
Guernsey v. Wood	130 Mass. 503	..	312,	398
Gutta Percha &c. Co. v. Mayor	108 N. Y. 276	..	..	57

H.

Haas v. Myers	111 Ill. 421	..	..	31
Haase v. Nonnemacher	21 Minn. 486	..	..	368
Hale v. Gerrish	8 N. H. 374	..	..	135
Hale v. Spaulding	145 Mass. 482	..	..	383
Hale v. Trout	35 Calif. 229	..	352,	357
Hale v. Wilson	70 Iowa, 311	..	..	388
Hall v. Crowley	5 Allen (Mass.), 304	..	..	330
Hall v. Perkins	3 Wend. (N. Y.) 626	..	65, 92,	223
Hall v. Stevens	116 N. Y. 201	..	..	347
Hallenbeck v. Kindred	109 N. Y. 620	..	..	281
Hamer v. Sidway	124 N. Y. 538	..	..	8, 91
Hamilton v. Home Ins. Co. ..	137 U. S. 370	..	246,	362
Hamilton v. Liverpool Ins. Co.,	136 U. S. 242	..	..	246
Hamilton v. Lycoming &c. ..	5 Pa. St. 339	..	..	144
Hamlin v. Sears	82 N. Y. 327	..	..	406
Hamlin v. Stevenson	4 Dana (Ky.), 597	..	..	131
Hammond v. Hopping	13 Wend. (N. Y.) 505	..	..	125
Hammond v. Pennock	61 N. Y. 145	..	..	190
Hampton v. McConnel	3 Wheat. (U. S.) 234	..	..	58
Hanauer v. Doane	12 Wall. (U. S.) 342	..	..	257
Handy v. St. Paul Globe Pub. Co.,	41 Minn. 188	..	228,	255
Hapgood v. Shaw	105 Mass. 276	..	..	362
Hardell v. McClure	1 Chandl. (Wis.) 271	..	..	87
Hardy v. Waters	38 Me. 450	..	..	131
Harland v. Lilienthal	53 N. Y. 438	..	..	227
Harms v. McCormick	132 Ill. 104	..	..	281
Harran v. Foley	62 Wis. 584	..	..	170
Harralson v. Stein	50 Ala. 347	..	..	414
Harrington v. Grant	54 Vt. 236	..	..	267
Harris v. More	70 Cal. 502	..	43,	102
Harris v. Runnels	12 How. (U. S.) 79	..	..	227
Harris v. White	81 N. Y. 532	..	..	229
Hart v. British Ins. Co. ..	80 Cal. 440	..	..	192
Hartford Protection Ins. Co. v. } Harmer	2 Oh. St. 452	..	..	193
Harvey v. Merrill	150 Mass. 1	..	237, 259,	271
Haskell v. Starbird	152 Mass. 117	..	..	427

					PAGE
Hastings v. Dollarhide ..	24 Cal. 195 ..	..	..	..	131, 134
Hatch v. Hatch ..	60 Vt. 160 ..	..	..	..	135
Hatch v. Taylor ..	10 N. H. 530 ..	..	..	..	416
Haven v. Neal ..	43 Minn. 315 ..	..	..	..	208
Hawkins v. Graham ..	149 Mass. 284 ..	..	..	..	348
Hayes v. O'Brien ..	149 Ill. 403 ..	..	..	..	34, 37
Hayes v. Willio ..	4 Daly (N. Y. C. P.), 259 ..	..	..	..	291
Hayward v. Barker ..	52 Vt. 429 ..	..	..	..	125
Hayward v. Leonard ..	7 Pick. (Mass.) 180 ..	..	..	..	348
Hazard v. New England Marine Ins. Co. ..	1 Sumner (U. S. C. C.), 218 ..	..	..	..	322
Heaton v. Angier ..	7 N. H. 397 ..	..	..	..	289
Hecht v. Batcheller ..	147 Mass. 335 ..	..	..	..	167
Heermans v. Ellsworth ..	64 N. Y. 159 ..	..	..	..	292
Hefner v. Vandolah ..	62 Ill. 483 ..	..	..	..	408
Heirn v. McCaughan ..	32 Miss. 1 ..	..	..	..	46
Hendrick v. Lindsay ..	93 U. S. 143 ..	..	..	..	95, 281
Henry v. Heeb ..	114 Ind. 275 ..	..	..	..	408
Henry v. Root ..	33 N. Y. 526 ..	..	..	..	135
Herreshoff v. Boutineau ..	17 R. I. 3 ..	..	..	..	252
Hertzog v. Hertzog ..	29 Pa. St. 465 ..	..	..	..	10, 17, 436
Herzog v. Sawyer ..	61 Md. 344 ..	..	..	..	342
Hewett v. Currier ..	63 Wis. 386 ..	..	..	..	99
Heyn v. Philips ..	37 Cal. 529 ..	..	..	..	74
Hickey v. Morrell ..	102 N. Y. 454 ..	..	..	..	206
Hicks v. Burhans ..	10 Johns. (N. Y.) 242 ..	..	..	..	120
Higert v. Indiana Asbury Univ.,	53 Ind. 326 ..	..	..	..	109
Higgins v. Kusterer ..	41 Mich. 318 ..	..	..	..	84
Hill v. Blake ..	97 N. Y. 216 ..	..	..	..	343
Hill v. Grigsby ..	35 Calif. 656 ..	..	..	..	362
Hinely v. Margaritz ..	3 Pa. St. 428 ..	..	..	..	135
Hirth v. Graham ..	50 Oh. St. 57 ..	..	..	..	74, 84
Hittson v. Browne ..	3 Colo. 304 ..	..	..	..	227
Hobbs v. Massasoit Whip Co.,	158 Mass. 194 ..	..	..	..	17, 25
Hobbs v. Straine ..	149 Mass. 212 ..	..	..	..	127
Holbrook v. Burt ..	22 Pick. (Mass.) 546 ..	..	..	..	293
Holcomb v. Noble ..	69 Mich. 396 ..	..	..	..	177, 208
Holden v. Banes ..	140 Pa. St. 63 ..	..	..	..	94
Homer v. Thwing ..	3 Pick. (Mass.) 492 ..	..	..	..	143
Horner v. Frazier ..	65 Md. 1 ..	..	..	..	74
Hosler v. Hursh ..	151 Pa. St. 415 ..	..	..	..	384
Hosmer v. Wilson ..	7 Mich. 294 ..	..	..	..	357
Hotchkin v. Third N. Bk. ..	127 N. Y. 329 ..	..	..	..	203, 206
Hough v. Barton ..	20 Vt. 455 ..	..	..	..	289
Houghwout v. Boisaubin ..	18 N. J. Eq. 315 ..	..	..	..	34
House v. Alexander ..	105 Ind. 109 ..	..	..	..	141, 142
Howard v. Manufacturing Co.,	139 U. S. 199 ..	..	..	..	377
Howard v. Simkins ..	70 Ga. 322 ..	..	..	..	140
Howarth v. Warmser ..	58 Ill. 48 ..	..	..	..	310
Howe Machine Co. v. Farrington,	82 N. Y. 121 ..	..	..	..	198
Howell v. Graff ..	25 Neb. 130 ..	..	..	..	416
Howland v. Lounds ..	51 N. Y. 604 ..	..	..	..	20
Howsmon v. Trenton Water Co.,	119 Mo. 304 ..	..	..	..	281
Hoyt v. Wilkinson ..	10 Pick. (Mass.) 31 ..	..	..	..	439
Hubbard v. Greeley ..	84 Me. 340 ..	..	..	..	61
Hubbard v. Tenbrook ..	124 Pa. St. 291 ..	..	..	..	163
Hughes v. Oregon Ry. & Nav. Co.,	11 Ore. 437 ..	..	..	..	281
Hughes v. Wamsutta Mills ..	11 Allen (Mass.), 201 ..	..	..	..	393
Huguenin v. Courtenay ..	21 S. Car. 403 ..	..	..	..	394
Hunnell v. Duxbury ..	154 Mass. 286 ..	..	..	..	214
Hunt v. Jones ..	12 R. I. 265 ..	..	..	..	81

TABLE OF AMERICAN CASES.

xlix

							PAGE
Hunt v. Rousmanier	8 Wheat. (U. S.) 174	..	..	..	..	..	432
Hunt v. Wyman	100 Mass. 198	..	..	..	..	..	339
Huntington v. Knox	7 Cush. (Mass.) 371	..	..	..	..	..	163
Hutchensen v. Grubbs	80 Va. 251	..	..	..	..	..	59

I.

Ilsley v. Jewett	3 Met. (Mass.) 439	..	..	..	125
Indiana Mfg. Co. v. Hayes ..	155 Pa. St. 160	..	..	..	17
Insurance Co. v. Leslie ..	47 Oh. St. 409	..	..	..	193
Irvine v. Irvine	9 Wall. (U. S.) 617	..	..	..	134
Irwin v. Dyke	114 Ill. 302	..	..	..	380
Irwin v. Williar	110 U. S. 499	..	..	..	237
Irwin v. Wilson	45 Oh. St. 426	..	..	..	166, 167
Isham v. Post	141 N. Y. 100	..	..	..	101

J.

Jackson v. Twenty-third St. Ry.,	88 N. Y. 520	..	..	..	5
Jaffray v. Davis	124 N. Y. 164	..	..	104, 106,	335
James v. Newton	142 Mass. 366	..	..	..	291
James v. O'Driscoll	2 Bay (S. C.) 101	..	..	..	20
James v. Patten	6 N. Y. 9	..	..	..	80
Jamieson v. Indiana Natural Gas } Company	128 Ind. 555	..	..	..	393
Janvrin v. Exeter	48 N. H. 83	..	..	..	43
Jaques v. Methodist Church ..	17 Johns. (N. Y.) 548	..	..	..	151
Jefferson v. Asch	53 Minn. 446	..	..	..	281
Jeffrey v. Bigelow	13 Wend. (N. Y.) 518	..	..	..	427
Jessel v. Williamsburg Ins. Co.	3 Hill (N. Y.), 88	..	..	..	290
Joest v. Williams	42 Ind. 565	..	..	..	148
Johnson v. Armstrong	83 Tex. 325	..	..	..	423
Johnson v. Brooks	93 N. Y. 337	..	..	..	379
Johnson v. Hurley	115 Mo. 513	..	..	..	405
Johnson v. Walker	155 Mass. 253	..	..	..	395
Johnson's Adm'r v. Sellers' Adm'r,	33 Ala. 265	..	..	..	111
Johnston v. Patterson	114 Pa. St. 398	..	..	..	161
Jones v. Dow	142 Mass. 130	..	..	..	77
Jones v. Homer	60 Pa. St. 214	..	..	..	145
Jones v. Stanly	76 N. C. 355	..	..	..	279
Jordan v. Coffield	70 N. C. 110	..	..	..	140
Jordan v. Davis	108 Ill. 336	..	..	..	60
Judd v. Weber	55 Conn. 267	..	..	..	213
Justice v. Lang	42 N. Y. 493	..	..	..	11

K.

Kadish v. Young	108 Ill. 170	..	..	..	353
Kantrowitz v. Prather	31 Ind. 92	..	..	..	151
Katz v. Bedford	77 Cal. 319	..	..	..	348
Keegan v. Cox	116 Mass. 289	..	..	..	135
Keener v. Crull	19 Ill. 189	..	..	..	125
Keller v. Ashford	133 U. S. 610	..	..	..	281
Keller v. Holderman	11 Mich. 248	..	..	..	3, 48
Kellogg Bridge Co. v. Hamilton,	110 U. S. 108	..	..	..	367
Kelly v. Bliss	54 Wis. 187	..	..	..	334
Kempner v. Cohn	47 Ark. 519	..	..	..	41
Kennett v. Chambers	14 How. (U. S.) 38	..	..	..	243
Kent v. Kent	62 N. Y. 560	..	..	..	75
Kent v. Rand	64 N. H. 45	..	..	..	125
Kershaw v. Kelsey	100 Mass. 561	..	..	..	129, 243

				PAGE
Kidder v. Kidder	.. ..	33 Pa. St. 268	.. ..	106, 383
Killmore v. Howlett	.. ..	48 N. Y. 569	.. ..	74
King v. Eagle	.. ..	10 Allen (Mass.), 548	.. ..	177
King v. Knapp	.. ..	59 N. Y. 462	.. ..	196
King of Prussia v. Kuepper's Adm'r,	.. ..	22 Mo. 550	.. ..	130
King Philip Mills v. Slater	.. ..	12 R. I. 82	.. ..	365
Kingsley v. Davis	.. ..	104 Mass. 178	.. ..	426
Kirkpatrick v. Stainer	.. ..	22 Wend. (N. Y.) 244	.. ..	420
Kittredge v. Holt	.. ..	58 N. H. 191	.. ..	385
Knight v. Abbott	.. ..	30 Vt. 577	.. ..	348
Knowlton v. Congress Spring Co.,	.. ..	57 N. Y. 518	.. ..	269
Krell v. Codman	.. ..	154 Mass. 454	.. ..	15, 66
Kroeger v. Pitcairn	.. ..	101 Pa. St. 311	.. ..	178, 200, 421
Krohn v. Bantz	.. ..	68 Ind. 277	.. ..	80
Kromer v. Heim	.. ..	75 N. Y. 574	.. ..	106, 384
Kullman v. Greenebaum	.. ..	92 Cal. 403	.. ..	240
Kurtz v. Frank	.. ..	76 Ind. 594	.. ..	248, 353
Kyle v. Kavanagh	.. ..	103 Mass. 356	.. ..	166
Kyte v. Commonwealth Union	}	149 Mass. 116	.. ..	341
Ice Co.	.. ..			

L.

Lacy v. Getman	.. ..	119 N. Y. 109	.. ..	310, 395
Lagonda N. B. v. Partner	.. ..	46 Oh. St. 381	.. ..	266
Laidlaw v. Organ	.. ..	2 Wheat. (U. S.) 178	.. ..	170, 203
Lake Shore &c. Ry. v. Richards,	.. ..	152 Ill. 59	.. ..	352, 357
Lakeman v. Pollard	.. ..	43 Me. 463	.. ..	395
Lamprey v. Lamprey	.. ..	29 Minn. 151	.. ..	64
Lancaster v. Elliott	.. ..	28 Mo. App. 86	.. ..	25
Lane v. Smith	.. ..	103 Pa. St. 415	.. ..	293
Lansing v. Dodd	.. ..	45 N. J. L. 525	.. ..	331
Lapish v. Wells	.. ..	6 Me. 175, 189	.. ..	203
Larned v. Andrews	.. ..	106 Mass. 435	.. ..	226
Larsen v. Johnson	.. ..	78 Wis. 300	.. ..	73
La Rue v. Groezinger	.. ..	84 Calif. 281	.. ..	288
Lathrop v. Knapp	.. ..	27 Wis. 214	.. ..	109
Laverty v. Sneathen	.. ..	68 N. Y. 522	.. ..	410
Lawrence v. Cooke	.. ..	56 Me. 193	.. ..	75
Lawrence v. Fox	.. ..	20 N. Y. 268	.. ..	280, 281
Lawrence v. McCalmont	.. ..	2 How. (U. S.) 426	.. ..	91
Lawrence v. Miller	.. ..	86 N. Y. 131	.. ..	374
Lawson v. Hogan	.. ..	93 N. Y. 39	.. ..	337
Leather Manufacturers' Bank v.	}	117 U. S. 96	.. ..	201, 439
Morgan	.. ..			
Lehow v. Simonton	.. ..	3 Colo. 346	.. ..	281
Leighton v. Orr	.. ..	44 Iowa, 679	.. ..	223
Leonard v. Hughlett	.. ..	41 Md. 380	.. ..	62
Lewis v. Brehme	.. ..	33 Md. 412	.. ..	419
Lewis v. Browning	.. ..	130 Mass. 173	.. ..	31
Lewis v. Bruton	.. ..	74 Ala. 317	.. ..	270
Lewis v. Eagle Ins. Co.	.. ..	10 Gray (Mass.), 508	.. ..	192
Lewis v. Jewell	.. ..	151 Mass. 345	.. ..	213
Lewis v. Tilton	.. ..	64 Iowa, 220	.. ..	420
Libbey v. Telford	.. ..	48 Me. 316	.. ..	205
Linderman v. Farquharson	.. ..	101 N. Y. 434	.. ..	153
Lindsay v. Smith	.. ..	78 N. C. 328	.. ..	255
Lingenfelder v. Wainwright	}	103 Mo. 578	.. ..	102
Brewing Co.	.. ..			
Linneman v. Moross	.. ..	98 Mich. 178	.. ..	280
Litchfield v. Hutchinson	.. ..	117 Mass. 195	.. ..	208

TABLE OF AMERICAN CASES.

li

	PAGE
Little v. Mills	98 Mich. 423 264
Littleton v. Richardson	34 N. H. 179 57
Lonergan v. Buford	148 U. S. 581 219
Long v. Battle Creek	39 Mich. 323 48, 97
Long v. Hartwell	34 N. J. L. 116 343
Long v. Thayer	150 U. S. 520 435
Long v. Warren	68 N. Y. 426 215
Longworth v. Mitchell	26 Oh. St. 334, 342 33
Loper v. Robinson	54 Tex. 510 177
Loring v. Boston	7 Met. (Mass.) 400 34
Loud v. Pomona Land and Water Co.	153 U. S. 564 362
Louisville &c. Co. v. Lorick	29 S. Car. 533 76
Love v. Harvey	114 Mass. 80 232, 270
Lowber v. Bangs	2 Wall. (U. S.) 728 370
Lucas v. Coulter	104 Ind. 81 205
Lynch v. Mercantile Trust Co., ...	18 Fed. Rep. 486 178, 208
Lyon v. Kent	45 Ala. 656 402
Lyon v. Mitchell	36 N. Y. 235 244

M.

McAnnulty v. McAnnulty	120 Ill. 26 73, 76
McArthur v. Times Printing Co., ...	48 Minn. 319 407
McCaleb v. Price	12 Ala. 753 102
McCandless v. Allegheny Besse- mer Steel Co.	152 Pa. St. 139 43, 102
McCauley v. Davidson	10 Minn. 418 101
McClure v. Jefferson (Wis.)	54 N. Y. Rep. 777 368
McClure v. McClure	74 Ind. 108 134
McClure v. Otrich	118 Ill. 320 80
McClurg v. Terry	21 N. J. Eq. 225 3, 48
McCoy v. Metropolitan Ins. Co., ...	133 Mass. 82 195
McCreedy v. Thorn	51 N. Y. 454 405
McCreery v. Day	119 N. Y. 1 336, 342, 384
McCulloch v. Eagle Ins. Co.	1 Pick. 278 31
McDonald v. Bewick	51 Mich. 79 14
McGoren v. Avery	37 Mich. 120 174, 441
McIntyre v. Buell	132 N. Y. 192 177
McJilton v. Love	13 Ill. 486 385
McKanna v. Merry	61 Ill. 177 142
Mackay v. St. Mary's Church	15 R. I. 121 145
McKenzie v. Harrison	120 N. Y. 260 342
McKinney v. Alvis	14 Ill. 33 290
McKown v. Furgason	47 Iowa, 636 208
Maclay v. Harvey	90 Ill. 525 33, 34
McMillan v. Ames	38 Minn. 257 36, 37
McRaven v. Crisler	53 Miss. 542 362
Mactier v. Frith	6 Wend. (N. Y.) 103 31
Malone v. Boston &c., R.	12 Gray (Mass.), 388 22, 23
Manchester v. Braedner	107 N. Y. 346 389
Manchester Paper Co. v. Moore, ...	104 N. Y. 680 322
Manhattan Brass &c. Co. v. } Thompson	58 N. Y. 80 (1874) 153
Manly v. Howlett	55 Calif. 94 380
Manning v. Sprague	148 Mass. 18 248
Maple v. R. Co.	40 Oh. St. 313 426
Marcy v. Marcy	9 Allen (Mass.), 8 75
Marston v. Bigelow	150 Mass. 45 280, 282
Martin v. Royster	8 Ark. 74 243
Martin v. Stubbings	126 Ill. 387 239

				PAGE
Martin v. Webb	..	..	110 U. S. 7	405
Materne v. Harwitz	..	..	101 N. Y. 469	240
Mather v. Butler County	..	..	28 Iowa, 253	378
Mathews v. Sharp	..	..	99 Pa. St. 560	330
Mathewson v. Fitch	..	..	22 Calif. 86	248
Matthiessen &c. Co. v. McMa- hon's Adm'r	..	..	38 N. J. L. 536	402, 434
Maurin v. Fogelberg	..	..	37 Minn. 23	72
May v. Williams	..	..	61 Miss. 125	71
Mayer v. New York	..	..	63 N. Y. 455	441
Maynard v. Hill	..	..	125 U. S. 190	4
Maynard v. Maynard	..	..	49 Vt. 297	203
Mead v. Watson	..	..	57 Vt. 426	72
Meguire v. Corwine	..	..	101 U. S. 108	243
Melbourne &c. R. v. Louisville &c. R.	..	..	88 Ala. 443	101
Mercer County v. Hackett	..	..	1 Wall. (U. S.) 83	300
Merrick v. Giddings	..	..	1 Mackey (D. C.), 394	111, 121
Merrill v. Packer	..	..	80 Iowa, 542	97, 240
Merrill v. Peaslee	..	..	146 Mass. 460	249
Merritt v. Earle	..	..	29 N. Y. 117	228
Metropolitan Life Ins. Co. v. Bender	..	..	124 N. Y. 47	62
Middlebury College v. Chandler,	..	..	16 Vt. 683	140, 142
Middlefield v. Church Mills Knit- ting Co.	..	..	160 Mass. 267	308
Middleton v. Hoge	..	..	5 Bush (Ky.), 478	135
Milford v. Water Co.	..	..	124 Pa. St. 610	407
Mill-dam Foundry v. Hovey	..	..	21 Pick. 417, 436	371
Miller v. Covert	..	..	1 Wend. (N. Y.) 487	58, 384
Miller v. Miller	..	..	1 J. J. Marsh. (Ky.) 169	149
Miller v. Sims	..	..	2 Hill (S. C.), 479	135
Millard v. Thorn	..	..	56 N. Y. 402	338
Mills v. Durgee	..	..	7 Cranch (U. S.), 481	58
Mills v. Wyman	..	..	3 Pick. (Mass.) 207	94, 115
Minneapolis &c. Ry. v. Columbus Rolling Mill	..	..	119 U. S. 149	2, 49
Minnesota Oil Co. v. Collier &c. Co.,	..	..	4 Dillon (U. S. C. C.), 431	34
Minock v. Shortridge	..	..	21 Mich. 304	124, 134, 135
Mohr v. Miesen	..	..	47 Minn. 228	237
Montgomery v. Montgomery Wa- ter Works	..	..	77 Ala. 248	17
Moor v. Towle	..	..	38 Me. 133	58
Moore v. Murdock	..	..	26 Calif. 514	228
Moore v. Nowell	..	..	94 N. C. 265	57
Moore v. Phoenix Ins. Co.	..	..	62 N. H. 240	341
More v. Bennett	..	..	140 Ill. 69	253
Morehouse v. Comstock	..	..	42 Wis. 626	115
Moreland v. Atchison	..	..	19 Tex. 303	207
Morley v. Lake Shore Ry.	..	..	146 U. S. 162	3, 9, 57, 439
Morrill v. Nightingale	..	..	93 Cal. 452	218
Morrill v. Wallace	..	..	9 N. H. 113	182
Morrison v. Herrick	..	..	130 Ill. 631	82
Morse v. Woodworth	..	..	155 Mass. 233	218
Moss v. Averell	..	..	10 N. Y. 449	145
Mott v. Hicks	..	..	1 Cow. (N. Y.) 513	144
Mott v. Oppenheimer	..	..	135 N. Y. 312	308
Moulton v. Kershaw	..	..	59 Wis. 316	47
Muir v. Schenck	..	..	3 Hill (N. Y.), 228	293
Mulholland v. Bartlett	..	..	74 Ill. 58	98, 99
Muller v. Eno	..	..	14 N. Y. 597	276

TABLE OF AMERICAN CASES.

liii

		PAGE
Mulvey v. King	39 Oh. St. 491	177
Munroe v. Perkins	9 Pick. (Mass.) 298	102, 342
Murchie v. Cornell	165 Mass. 60	367
Murray v. Snow	37 Iowa, 410	109
Mussey v. Rayner	22 Pick. (Mass.) 223	28
Mutual Life Ins. Co. v. Allen . .	138 Mass. 24	239
Mutual Life Ins. Co. v. Hunt . .	79 N. Y. 541	148
Myer v. Wheeler	65 Iowa, 390	365

N.

Nash v. Jewett	61 Vt. 501	143
Nash v. Minnesota &c. Co. . . .	159 Mass. 437	214
Nashville &c. Ry. v. United States,	113 U. S. 261	385
National Bank v. Grand Lodge,	98 U. S. 123	281
National Bank v. Matthews . .	98 U. S. 621	227, 263
National Benefit Co. v. Union Hospital Co.	45 Minn. 272	252
National Furnace Co. v. Keystone Mfg. Co.	110 Ill. 427	36
Naumberg v. Young	44 N. J. L. 331	321
Neely v. Jones	16 W. Va. 625	276
New v. Walker	108 Ind. 365	265, 296
Newburg Petroleum Co. v. Weare,	44 Oh. St. 604	306
Newell v. Smith	49 Vt. 255	414
New York Life Ins. Co. v. Fletcher,	117 U. S. 519	195
New York &c. Co. v. Dryburg,	35 Pa. St. 298	208
New York &c. Co. v. Memphis Water Co.	107 U. S. 205	291
New York &c. R. v. Schuyler,	34 N. Y. 30	427
Nibert v. Baghurst	47 N. J. Eq. 201	82
Niblo v. Binsse	3 Abb. App. Dec. (N. Y.) 375	394
Nichols v. Mudgett	32 Vt. 546	244
Nichols v. Weaver	7 Kans. 373	75
Nickleson v. Wilson	60 N. Y. 362	245
Niemeyer v. Wright	75 Va. 239	227
Niles v. Davis	60 Miss. 750	82
Noel v. Murray	13 N. Y. 167	347
Nolan v. Whitney	88 N. Y. 648	348
Norcross v. James	140 Mass. 188	309
Norrington v. Wright	115 U. S. 188	183, 329, 365
Northern v. Lathrop	1 Ind. 113	84
Northrup v. Northrup	6 Cow. (N. Y.) 296	362
Noyes v. Loring	55 Me. 408	422
Noyes v. Wyckoff	114 N. Y. 204	348

O.

Oates v. Nat. Bk. . . .	100 U. S. 239	128
O'Brien v. Brietenbach	1 Hilt. (N. Y. C. P.) 304	261
O'Brien v. Young	95 N. Y. 428	3, 9, 57, 439
Odell v. Gray	15 Mo. 337	296
O'Donnell v. Leeman	43 Me. 158	77, 79, 317
Oelricks v. Ford	23 How. (U. S.) 49	420
Oliver v. Gilmore	52 Fed. Rep. 562	253
Oregon Pac. R. v. Forrest	128 N. Y. 83, 90	4
Ort v. Fowler	31 Kans. 478	161
Osborne v. Baker	34 Minn. 307	79
Oscanyan v. Arms Co. . . .	103 U. S. 261	244
Oskamp v. Gadsden	35 Neb. 7	161
Owen v. Hall	70 Md. 97	397

	P.	PAGE
Paddock v. Davenport ..	107 N. C. 710	37
Paddock v. Strobridge ..	29 Vt. 470	203
Paducah Lumber Co. v. Paducah Water Supply Co. ..	89 Ky. 340	281
Page v. Higgins ..	150 Mass. 27	157
Page v. Wells ..	37 Mich. 415	410
Paine v. Benton ..	32 Wis. 491	128
Palfrey v. Portland R. ..	4 Allen (Mass.), 55	98
Pangborn v. Westlake ..	36 Iowa, 546	227
Parcell v. McComber ..	11 Neb. 209	374
Parrish v. Thurston ..	87 Ind. 437	170
Parsons v. Loucks ..	48 N. Y. 17	87
Parsons v. Sutton ..	66 N. Y. 92	378
Parsons v. Taylor ..	12 Hun (N. Y.), 252	229
Partridge v. Hood ..	120 Mass. 403	245
Patent Brick Co. v. Moore ..	75 Calif. 205	330
Patrick v. Bowman ..	149 U. S. 411	31, 420
Patterson v. Lippincott ..	47 N. J. L. 457	402
Pearsall v. Western Union Tel. Co.,	124 N. Y. 256	208
Pearsoll v. Chapin ..	44 Pa. St. 9	272
Peebles v. Patapasco Guano Co.,	77 N. C. 233	427
Peltz v. Eichele. . .	62 Mo. 171	255
Pennsylvania Coal Co. v. Blake,	85 N. Y. 226	98
People v. Globe Mut. Life Ins. Co.,	91 N. Y. 174	393
Peoples' Bank v. Bogart ..	81 N. Y. 101	170
Pepper v. Tel. Co. ..	87 Tenn. 554	161
Perkins v. Lockwood ..	100 Mass. 249	106, 109
Perry v. Ellis ..	62 Miss. 711	388
Perry v. Mount Hope Iron Co.,	15 R. I. 380	31
Peters v. Westborough ..	19 Pick. (Mass.) 364	75
Peterson v. Mayer ..	46 Minn. 468	374
Peyson v. Conniff ..	32 Neb. 269	72
Phelps v. Worcester ..	11 N. H. 51	140
Phillip v. Gallant ..	62 N. Y. 256	161
Phillips v. Homfray ..	{ L. R. 24 Ch. D. 4, 39 }	121
Phillips v. South Park Com'rs,	119 Ill. 626	248
Phoenix Life Ins. Co. v. Raddin,	120 U. S. 183	195
Pierce v. Feagans ..	39 Fed. Rep. 587	385
Pierce v. Indseth ..	106 U. S. 546	60
Pierce v. Parker ..	4 Met. (Mass.) 8	383
Pierce v. Seymour ..	52 Wis. 272	386
Pierson v. Morch ..	82 N. Y. 503	15
Pierson v. Smith ..	9 Oh. St. 554	149
Piper v. Foshier. . .	121 Ind. 407	75
Pitkin v. Noyes. . .	48 N. H. 294	87
Pittsburg &c. R. v. Hallowell,	65 Ind. 188	392
Platner v. Patchin ..	19 Wis. 333	310
Pond v. Smith ..	4 Conn. 297	243
Pool v. Horner ..	64 Md. 131	120
Pope v. Allis ..	115 U. S. 363	367, 368
Pope v. Porter ..	102 N. Y. 366	365
Porter v. Day ..	71 Wis. 296	229
Poston v. Balch ..	69 Mo. 115	267
Potter v. Jacobs ..	111 Mass. 32	82
Powers v. Bumcratz ..	12 Oh. St. 273	28
Pratt v. Trustees ..	93 Ill. 475	32, 109
Preston v. Prather ..	137 U. S. 604	101
Price v. Sanders ..	60 Ind. 310	140, 141
Prutsman v. Baker ..	30 Wis. 644	61

TABLE OF AMERICAN CASES

lv

							PAGE
Purner v. Piercy	..	..	40 Md. 212	..	..	..	74
Putnam v. Tennyson	..	..	50 Ind. 456	..	..	..	125
Pyne v. Wood	..	..	145 Mass. 558	..	..	..	140, 142

R.

Railroad Co. v. Reeves	..	..	10 Wall. (U. S.) 176	..	..	..	341
Randall v. Randall	..	..	37 Mich. 563	..	..	..	249
Randall v. Sweet	..	..	1 Denio (N. Y.), 460	..	..	..	141
Randolph Iron Co. v. Elliott	..	..	34 N. J. L. 184	..	..	..	163
Rapley v. Racine Seeder Co.,	..	..	79 Iowa, 220	..	..	..	341
Ray v. Thompson	..	..	12 Cush. (Mass.) 281	..	..	93, 339,	341
Ray v. Tubbs	..	..	50 Vt. 688	..	..	..	144
Rayner v. Wilson	..	..	43 Md. 440	..	..	..	196
Ready v. Noakes	..	..	29 N. J. Eq. 497	..	..	..	92
Reece v. Kyle	..	..	49 Oh. St. 475	..	..	..	248
Reed v. Batchelder	..	..	1 Met. (Mass.) 559	..	..	..	124
Reed v. Insurance Co.	..	..	95 U. S. 23	..	..	..	327
Reed v. Pierce	..	..	36 Me. 455	..	..	..	398
Reif v. Paine	..	..	55 Wis. 496	..	..	15, 26,	114
Reinskopf v. Rogge	..	..	37 Ind. 207	..	..	..	148
Relief Fire Ins. Co. v. Shaw	..	..	94 U. S. 574	..	..	..	68
Remy v. Olds	..	..	88 Calif. 537	..	..	..	353
Reynolds v. Robinson	..	..	110 N. Y. 654	..	..	..	319
Reynolds v. Stevenson	..	..	4 Ind. 619	..	..	..	228
Rice v. Boyer	..	..	108 Ind. 472	..	..	..	143
Rice v. Grange	..	..	131 N. Y. 149	..	..	..	158
Rich v. New York Central &c. R.,	..	..	87 N. Y. 382	..	..	..	9
Richardson v. Buhl	..	..	77 Mich. 632	..	..	..	253
Richardson v. Rowland	..	..	40 Conn. 571	..	..	..	248
Richmond v. Moore	..	..	107 Ill. 429	..	..	..	228
Richmond v. Morford	..	..	4 Wash. 337	..	..	..	61
Riegel v. American Life Ins. Co.,	..	..	{ 140 Pa. St. 193 S. C. 153 Pa. St. 134 }	..	..	..	167
Ries v. Rowland	..	..	11 Fed. Rep. 657	..	..	..	58
Ring v. Devlin	..	..	68 Wis. 384	..	..	..	43
Rittler v. Smith	..	..	70 Md. 261	..	..	..	239
Roberts v. Bonaparte	..	..	73 Md. 191	..	..	..	327
Roberts v. Donovan	..	..	70 Cal. 108	..	..	..	199
Robertson v. Robinson	..	..	65 Ala. 610	..	..	..	243
Robinson v. Jewett	..	..	116 N. Y. 40	..	..	..	111
Robinson v. Hurst	..	..	78 Md. 59	..	..	..	94
Rochester Lantern Co. v. Stiles &c. Co.	..	..	{ 135 N. Y. 209	..	..	..	288, 377
Rockwell v. Elkhorn Bk.	..	..	13 Wis. 731	..	..	..	145
Rodliff v. Dallinger	..	..	141 Mass. 1	..	..	..	174, 272
Roebbling's Sons Co. v. Lock Stitch Fence Co.	..	..	{ 130 Ill. 660	..	..	..	355
Rohan v. Hanson	..	..	11 Cush. (Mass.) 44	..	..	..	142
Ross v. Drinkard's Adm'r	..	..	35 Ala. 434	..	..	..	207
Ross v. Hurd	..	..	71 N. Y. 14	..	..	..	127
Rotholz v. Schwartz	..	..	46 N. J. Eq. 477	..	..	..	379
Rovegno v. Defferari	..	..	40 Cal. 459	..	..	..	2, 157
Rowland v. New York &c. R.	..	..	61 Conn. 103	..	..	..	157
Rowley v. Bigelow	..	..	12 Pick. (Mass.) 307	..	..	..	217, 272
Royal Ins. Co. v. Beatty	..	..	119 Pa. St. 6	..	..	..	24
Ruckman v. Ruckman	..	..	32 N. J. Eq. 259	..	..	..	60
Rugg v. Moore	..	..	110 Pa. St. 236	..	..	..	365
Rupley v. Daggett	..	..	74 Ill. 351	..	..	..	2, 157
Rush v. Wick	..	..	31 Oh. St. 521	..	..	..	131
Russell v. Cook	..	..	3 Hill (N. Y.), 504	..	..	..	99, 105

							PAGE
Russell v. Stewart	..	..	44	Vt.	170	..	20
Ryan v. United States	..	..	136	U. S.	68	..	77
S.							
Sailsbury v. Howe	..	..	87	N. Y.	128	..	208
Sailsbury v. Shirley	..	..	66	Cal.	223	..	306
Salander v. Lockwood	..	..	66	Ind.	285	..	162
Samuel v. Cheney	..	..	135	Mass.	278	..	164
Sanborn v. Cole	..	..	63	Vt.	590	..	317
Sanborn v. Flagler	..	..	9	Allen (Mass.)	474	..	79
Santa Clara &c. Co. v. Hayes	..	..	76	Calif.	387	..	253, 255
Saunders v. Ott	..	..	1	Mc Cord (S. C.)	572	..	140
Saville v. Chalmers	..	..	76	Iowa	325	..	62
Savings Bank v. Shaffer	..	..	9	Neb.	1	..	397
Savings Bank v. Ward	..	..	100	U. S.	195	..	214
Sawyer v. Lufkin	..	..	56	Me.	308	..	148
Sceva v. True	..	..	53	N. H.	627	..	148
Schenectady Stone Co. v. Holbrook	..	..	101	N. Y.	45	..	34
Schmidt v. Pfau	..	..	114	Ill.	483	..	389
Schnell v. Nell	..	..	17	Ind.	29	..	94
School Directors v. Boomhour	..	..	83	Ill.	17	..	186
Schreve v. Grimes	..	..	4	Litt. (Ky.)	220	..	121
Schubert v. Clark Co.	..	..	49	Minn.	331	..	214
Schuler v. Mytton	..	..	48	Kans.	282	..	111
Schumaker v. Mather	..	..	133	N. Y.	590	..	215
Scudder v. Union Nat. Bk.	..	..	91	U. S.	406	..	81
Sears v. Eastern R.	..	..	14	Allen (Mass.)	433	..	46
Seaver v. Phelps	..	..	11	Pick. (Mass.)	304	..	148
Sevier v. Birmingham &c. R.	..	..	92	Ala.	258	..	405
Seymour v. Marlboro'	..	..	40	Vt.	171	..	120
Shaber v. St. Paul Water Co.	..	..	30	Minn.	179	..	308
Shamp v. Meyer	..	..	20	Neb.	223	..	281
Shaw v. Railroad Co.	..	..	101	U. S.	557	..	304
Sheldon v. Davidson	..	..	85	Wis.	138	..	206, 215
Shelton v. Ellis	..	..	70	Ga.	297	..	170, 174
Shepard v. Rhodes	..	..	7	R. I.	470	..	115, 124
Sherman v. Kitsmiller	..	..	17	S. & R. (Pa.)	45	..	48, 97
Sherwood v. Andrews	..	..	2	Allen (Mass.)	79	..	5
Sherwood v. Walker	..	..	66	Mich.	568	..	167, 174
Shipley v. Carroll	..	..	45	Ill.	285	..	162
Short v. Home Ins. Co.	..	..	90	N. Y.	16	..	193
Shuey v. United States	..	..	92	U. S.	73	..	41
Sigerson v. Mathews	..	..	20	How. (U. S.)	496	..	127
Siler v. Gray	..	..	86	N. C.	566	..	310
Sims v. Ferrill	..	..	45	Ga.	585	..	207
Singer v. Carpenter	..	..	125	Ill.	117	..	379
Skiff v. Stoddard	..	..	63	Conn.	198	..	413
Slade v. Mutrie	..	..	156	Mass.	19	..	335, 383
Slater Woollen Co. v. Lamb	..	..	143	Mass.	420	..	146
Slaughter's Adm'r v. Gerson	..	..	13	Wall.	379	..	215
Smalley v. Greene	..	..	52	Iowa	241	..	75
Smith v. Bettger	..	..	68	Ind.	254	..	346
Smith v. Collins	..	..	42	Kans.	259	..	59
Smith v. Mace	..	..	44	N. H.	553	..	397
Smith v. Smith	..	..	125	N. Y.	224	..	380
Smith v. Tripp	..	..	14	R. I.	112	..	127
Smith v. Whildin	..	..	10	Pa. St.	39	..	102
Smith v. Wood	..	..	12	Wis.	425	..	64
Snell v. Atlantic Ins. Co.	..	..	98	U. S.	85	..	157, 174
Snyder v. Click	..	..	112	Ind.	293	..	28

TABLE OF AMERICAN CASES.

lvii

	PAGE
Solon v. Williamsburg Sav. Bk.,	114 N. Y. 122 60
Somes v. Brewer	2 Pick. (Mass.) 183 272
South Scituate v. Hanover ..	9 Gray (Mass.), 420 276
Southard v. Boyd	51 N. Y. 177 244
Southern Development Co. v. Silva,	125 U. S. 247 191, 203
Soutier v. Kellerman	18 Mo. 509 324
Spalding v. Rosa	71 N. Y. 40 395
Spring Co. v. Knowlton	103 U. S. 49 269
Spurr v. Benedict	99 Mass. 463 190
Stamper v. Temple	6 Humph. (Tenn.) 113 20
Standeford v. Devol	21 Ind. 404 149
Stanton v. Embrey	93 U. S. 548 385
Stark v. Parker	2 Pick. (Mass.) 267 374
Starr v. Wright	20 Oh. St. 97 121
State v. Plaisted	43 N. H. 413 134
Stearns v. Hall	9 Cush. (Mass.) 31 343
Steel v. Lord	70 N. Y. 280 398
Stensgaard v. Smith	43 Minn. 11 25
Sterling v. Sinnickson	2 South (5 N. J. L.), 756 64, 249
Stern v. Freeman	4 Met. (Ky.) 309 124
Stevens v. Coon	1 Pinney (Wis.), 356 96
Stevens v. Flannagan	131 Ind. 122 282
Stevens v. Giddings	45 Conn. 507 196
Stevens v. Ludlum	46 Minn. 160 201, 214
Stevens v. Philadelphia Ball Club,	142 Pa. St. 52 300
Stewart v. Ketelas	36 N. Y. 388 103
Stewart v. Stone	127 N. Y. 500 394
Stewart v. Wyoming Ranch Co.,	128 U. S. 383 170, 203
Story v. Lovett	1 E. D. Smith (N. Y. C. P.), 153 317
Story v. Solomon	71 N. Y. 420 237
Stovall v. Barnett	4 Littell (Ky.), 208 94
Streeper v. Williams	48 Pa. St. 450 329
Strong v. Foote	42 Conn. 203 140
Strong v. Marcy	33 Kans. 109 281, 282
Stroud v. Smith	4 Houst. (Del.) 448 243
Sturges v. Crowninshield ..	4 Wheat. (U. S.) 122 398
Sturn v. Boker	150 U. S. 312 339
Suman v. Springate	67 Ind. 115 80
Summers v. Vaughan	35 Ind. 323 115
Swain v. Schieffelin	134 N. Y. 471 377
Swain v. Seamens	9 Wall. (U. S.) 254 343
Sweeney v. Thomason	9 Lea (Tenn.), 359 324
Swentzel v. Penn Bank	147 Pa. St. 140 101
Swift Co. v. United States ..	111 U. S. 22 440

T.

Taintor v. Prendergast	3 Hill (N. Y.), 72 425
Talcott v. Henderson	31 Oh. St. 162 206
Tallmadge v. East River Bank,	26 N. Y. 105 309
Tarbell v. Stevens	7 Ia. 163 46
Tayloe v. Merchant's Fire Ins. Co.,	9 How. (U. S.) 390 30
Taylor v. Bemiss	110 U. S. 42 248
Taylor v. Carpenter	3 Story (U. S.), 458 129
Taylor v. Cottrell	16 Ill. 93 245
Taylor v. Leith	26 Oh. St. 428 190
Teeters v. Lamborn	43 Oh. St. 144 72
Terre Haute &c. R. v. McMurray,	98 Ind. 358 405
Terry v. Birmingham Nat. Bk.,	99 Ala. 566 413
Thalhimer v. Brinckerhoff ..	3 Cow. (N. Y.) 623 247
Thayer v. Daniels	113 Mass. 129 293

	PAGE
Thomas v. Atkinson	38 Ind. 248 426
Thomas v. Winchester	6 N. Y. 397 214
Thompson v. Kelly	101 Mass. 291 417
Thompson v. Rose	8 Cow. (N. Y.) 266 306
Thorne v. Deas	4 Johns. (N. Y.) 84 101
Thornton v. Village of Sturgis, ...	38 Mich. 639 20
Thorp v. Keokuk Coal Co. . . .	48 N. Y. 253 281
Thrift v. Payne	71 Ill. 408 374
Thurston v. Arnold	43 Iowa, 43 321, 329
Thurston v. Thornton	1 Cush. (Mass.) 89 14
Thwing v. Hall & Co. . . .	40 Minn. 184 167
Tiedeman v. Knox	53 Md. 612 304
Tobias v. Rogers	13 N. Y. 59 439
Tolhurst v. Powers	133 N. Y. 460 102, 218
Tool Co. v. Norris	2 Wall. (U. S.) 45 244
Towne v. Wiley	23 Vt. 355 143
Townsend v. Derby	3 Met. (Mass.) 363 90
Townsend v. Hargraves	118 Mass. 325 80, 88
Tracy v. Albany Exchange Co., ...	7 N. Y. 472 362
Trader v. Lowe	45 Md. 1 135
Traders' Bank v. Alsop	64 Iowa, 97 265
Trainer v. Trumbull	141 Mass. 527 140, 142
Trambly v. Ricard	130 Mass. 259 161
Trenton & Co. Ins. Co. v. Johnson, ...	24 N. J. L. 576 232, 238
Trentor v. Pothien	46 Minn. 298 428
Trevor v. Wood	33 N. Y. 307 31
Trimble v. Strother	25 Oh. St. 378 281
Trist v. Child	21 Wall. (U. S.) 441 244
Troewert v. Decker	51 Wis. 46 228
Trueblood v. Trueblood	8 Ind. 195 131
Trustees v. Haskell	73 Me. 140 109
Tuck v. Downing	76 Ill. 71 192
Tucker v. White	125 Mass. 344 176
Tufts v. Lawrence	77 Tex. 526 357
Tupper v. Caldwell	12 Met. (Mass.) 559 142
Turner v. Gaither	83 N. C. 357 135, 141, 142
Turner v. McFee	61 Ala. 468 128
Twenty-third Street Baptist } Church v. Cornell }	117 N. Y. 601 32, 109
Tyler v. Carlisle	79 Me. 210 234, 235, 257, 261, 269

U.

Underwood v. Wolfe	131 Ill. 425 369
Union Bank v. Coster	3 N. Y. 203 28
United States v. Behan	110 U. S. 338 357, 377
United States v. Bradley	10 Pet. (U. S.) 343 255
United States v. Grossmayer	9 Wall. (U. S.) 72 129, 243
United States v. Peck	102 U. S. 64 356
United States v. Simons	7 Fed. Rep. 709 43
University of Des Moines v. Liv- } ingstone }	57 Iowa, 307 109
Upton v. Tribilcock	91 U. S. 45 207

V.

Van Brunt v. Day	81 N. Y. 251 321
Van Buskirk v. Hartford Fire } Ins. Co. . . . }	14 Conn. 141 293
Van Clief v. Van Vechten	130 N. Y. 571 348
Van Deusen v. Sweet	51 N. Y. 378 147

TABLE OF AMERICAN CASES.

lix

					PAGE
Van Shaack v. Robbins	..	36 Iowa, 201	..	..	272
Van Wyck v. Brasher	..	81 N. Y. 260	..	..	148
Vanuxem v. Burr	..	151 Mass. 386	..	..	58, 384
Vasburgh v. Diefendorf	..	119 N. Y. 357	..	..	236, 264, 265
Vassar v. Camp	..	11 N. Y. 441	..	..	31
Vilas v. Downer	..	21 Vt. 419	..	..	130
Vrooman v. Turner	..	69 N. Y. 280	..	..	280, 281

W.

Wade v. Kalbfleisch	..	58 N. Y. 282	..	..	311
Wadsworth v. Sharpsteen	..	8 N. Y. 388	..	..	147
Waggoner v. Cox	..	40 Oh. St. 539	..	..	330
Wagoner v. Watts	..	44 N. J. L. 126	..	..	403
Wahl v. Barnum	..	116 N. Y. 87	..	..	75
Wakeman v. Dalley	..	51 N. Y. 27	..	..	176, 208
Wakeman v. Wheeler & Wilson	}	101 N. Y. 205	..	..	377
Mfg. Co.					
Walden v. Louisiana Ins. Co.,	..	12 La. 134	..	..	169, 193
Waldron v. Murphy	..	40 Mich. 668	..	..	348
Wales v. Stout	..	115 N. Y. 638	..	..	70
Walker v. Brooks	..	125 Mass. 241	..	..	291
Walker v. Cronin	..	107 Mass. 555	..	..	279
Walker v. Ebert	..	29 Wis. 194	..	..	161, 296
Walker v. Herring	..	21 Gratt. (Va.) 678	..	..	417
Walker v. Mauro	..	18 Mo. 564	..	..	294
Walker v. Ocean Bank	..	19 Ind. 247	..	..	296
Walker v. Tucker	..	70 Ill. 527	..	..	394
Walls v. Bailey	..	49 N. Y. 464	..	..	324, 325
Walsh v. Powers	..	43 N. Y. 23	..	..	134
Walsh v. St. Louis Exposition,	..	16 Mo. App. 502	..	..	47
Walter A. Wood &c. Co. v. Smith,	..	50 Mich. 565	..	..	348
Ward v. Morrison	..	25 Vt. 593	..	..	293
Warner v. Whittaker	..	6 Mich. 133	..	..	293
Warnock v. Davis	..	104 U. S. 775	..	..	239
Washington Mills Mfg. Co. v.	}	135 Mass. 503	..	..	193
Weymouth Ins. Co.					
Waters v. Bean	..	15 Ga. 358	..	..	125
Watts v. Kavanagh	..	35 Vt. 34	..	..	432
Weaver v. Burr	..	31 W. Va. 736	..	..	34, 49
Webb v. Steele	..	13 N. H. 230	..	..	289
Weeks v. Esler	..	68 Hun (N. Y.), 518	..	..	145
Wells v. Alexandre	..	130 N. Y. 642	..	..	36
Wells v. Caywood	..	3 Colo. 487	..	..	152
Wells v. Monihan	..	129 N. Y. 161	..	..	80
Wells v. People	..	71 Ill. 532	..	..	227
Wells v. Porter	..	7 Wend. (N. Y.) 119	..	..	440
Wells v. Seixas	..	24 Fed. Rep. 82	..	..	134
Wells, Fargo & Co. v. Pacific Ins. Co.,	..	44 Cal. 397	..	..	182
Welsh v. Huckestein	..	152 Pa. St. 27	..	..	324
Welsh v. Welsh	..	5 Ohio, 425	..	..	121
Western Pub. House v. District	}	84 Iowa, 101	..	..	406
Tr of Rock					
Western Union Telegraph Co. v.	}	66 Miss. 549	..	..	208
Allen					
Western Union Tel. Co. v. Semmes,	..	73 Md. 9	..	..	358
Western Union Tel. Co. v. Shotter,	..	71 Ga. 760	..	..	161
Westervelt v. Demorest	..	46 N. J. L. 37	..	..	207
Westman v. Krumweide	..	30 Minn. 313	..	..	319
Weston v. Hodgkins	..	136 Mass. 326	..	..	389
Wheat v. Cross	..	31 Md. 99	..	..	31, 34, 41, 168, 170

				PAGE
Wheeler v. Hawkins	116 Ind. 515			227
Wheeler v. New Brunswick &c. R.	115 U. S. 29			333
Whipple v. Parker	29 Mich. 369			75
Whitbeck v. Van Ness	11 Johns. (N. Y.) 409			347
White v. Bigelow	154 Mass. 593			73
White v. Buss	3 Cush. (Mass.) 448			234
White v. Corlies	46 N. Y. 467		3, 14, 16, 25, 34	
White v. Kuntz	107 N. Y. 518			240
White v. Madison	26 N. Y. 117			178
Whitmarsh v. Walker	1 Met. (Mass.) 313			74
Wickham v. Grant	28 Kans. 517			186
Wiggin v. Hodgdon	63 N. H. 39			124
Wilcox v. Iowa Wesleyan University	32 Iowa, 367			190
Wiley v. Athol	150 Mass. 426			369
Wilkinson v. Heavenrich	58 Mich. 574			80
Wilkinson v. Tousley	16 Minn. 299			232
Williams v. Carrington	1 Hilt. (N. Y.) 515			109
Williams v. Forbes	114 Ill. 167		15, 66, 90	
Williams v. Ingersoll	89 N. Y. 508			293
Williams v. McGrade	13 Minn. 46			57
Williams v. Silliman	74 Tex. 626			128
Wilmington Transportation Co. v. O'Neil	98 Calif. 1			394
Wilmoth v. Hensel	151 Pa. St. 200			44
Wilson v. Edmunds	24 N. H. 517			120
Wilson v. Tucker	10 R. 1. 578			317
Winchester v. Howard	97 Mass. 303			425
Windmuller v. Pope	107 N. Y. 674			353
Wolcott v. Mount	36 N. J. L. 262	168, 182, 184, 368,		377
Wolf v. Marsh	54 Calif. 228			356
Wolff v. Koppel	5 Hill (N. Y.) 458			419
Wolford v. Powers	85 Ind. 294		8, 91	
Wood v. Boynton	64 Wis. 265		167, 169, 170	
Wood v. Faut	55 Mich. 185			385
Wood v. Gamble	11 Cush. (Mass.) 8			58
Wood v. Moriarty	15 R. 1. 518		281, 282, 320	
Wood v. Orford	52 Calif. 412			310
Wood v. Sheldon	42 N. J. L. 421		174, 441	
Wood v. Steele	6 Wall. (U. S.) 80			397
Wood Mowing &c. Co. v. Gaertner	55 Mich. 453			320
Woodberry v. Warner	53 Ark. 488			358
Woodruff v. Saul	70 Ga. 271			186
Woods v. Ayres	36 Mich. 345			10
Woods v. Wilder	43 N. Y. 164			243
Woodstock Iron Co. v. Richmond &c. Co.	129 U. S. 643			244
Wooten v. Walters	110 N. C. 251			365
Worcester County Bank v. Dorchester &c. Bank	10 Cush. (Mass.) 488			162
Workman v. Wright	33 Oh. St. 405			408
Worrall v. Munn	5 N. Y. 229			61
Worth v. Case	42 N. Y. 362			90
Wulschner v. Ward	115 Ind. 219			343
Wyble v. McPheters	52 Ind. 393			5

Y.

Young v. Stevens	48 N. H. 133			147
------------------	--------------	--	--	-----

TABLE OF AMERICAN CASES.

lxi

Z.

							PAGE
Zabriskie v. Central Vt. R.	..	131 N. Y. 72	..	..	..	184,	368
Zaleski v. Clark	..	44 Conn. 218	..	..	..	..	348
Zimmer v. New York Central &c. R.	..	137 N. Y. 460	..	..	..	..	22

ADDENDA.

*P. 15. *The Satanita*, [1895] P. 255, illustrates the making of a contract by conduct. A Yacht Racing Association offered prizes, made rules governing the competition for these prizes, and, among other rules, required the owner of a yacht which neglected certain conditions to pay damages for injury resulting from such neglect. Every yacht owner who sailed his yacht in competition for such prizes thereby contracted with every other owner who sailed his yacht to abide by the rules or to pay damages if injury resulted from their breach.

*P. 71. *Abbott & Co. v. Wolsey*, [1895] 2 Q. B. 97. Acceptance under 56 & 57 Vict. c. 71. § 4. sub-s. 3 takes place 'where the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale.' Such acceptance makes the contract actionable, and differs from acceptance in performance of the contract under § 35, for this last may take place 'not only by acts but by an intimation to the seller that the goods are accepted.'

*P. 166. *Turner v. Green*, [1895] 2 Ch. 205. In an agreement for the compromise of a suit neither party is bound to tell all he knows, nor is non-disclosure by one party of a fact which would have influenced the judgment of the other a ground for refusing specific performance.

*P. 227. *Flood v. Jackson*, [1895] 2 Q. B. at pp. 26, 27. Kennedy, J., points out that a malicious inducement to discharge a person from his employer's service, or a malicious inducement to refuse to employ him, are wrongs independent of an existing contract to employ. The right of action may arise from an inducement to break a contract, as in *Lunley v. Gye*, and other cases, but it need not do so. It is the malicious interference with another man in his trade or livelihood which, apart from contract, furnishes the cause of action.

*P. 294. *O'Neil v. Armstrong* is affirmed on Appeal, [1895] 2 Q. B. 70.

PART I.

INTRODUCTION.

THE PLACE OF CONTRACT IN JURISPRUDENCE.

AT the outset of an inquiry into the principles of the law of contract it is well to state the main objects of the inquiry and the order in which they arise for discussion.

Outline of the subject.

We must first ascertain what we mean by contract, and what is the relation of contract to other legal conceptions.

Nature of contract.

Next we must ask how a contract is made ; what things are needful to the formation of a valid contract.

Its formation.

When a contract is made we ask whom it affects, or can be made to affect. This is the operation of contract.

Its operation.

Then we inquire how the courts regard a contract in respect of the evidence which proves its existence, or the construction placed on its terms. This we may call the interpretation of contract.

Its interpretation.

Last we come to the discharge of contract, or the various modes by which the contractual tie is unfastened and the parties relieved from contractual liability.

Its discharge.

And first as to the nature of contract.

Nature of contract.

Contract results from a combination of the two ideas of agreement and obligation. This statement must be limited in its application to a scientific system of jurisprudence in which rights have been analyzed and classified. The conception of obligation, as we understand it,

Contract is agreement resulting in obligation.

was probably not *clearly present to the minds of the judges who first enforced promises to do or to forbear; and we may be quite sure that they did not rest their decisions, as to the validity of such promises, upon agreement or the union of wills. But the analysis is none the less accurate because it has not always been made or understood.

Contract is that form of agreement which directly contemplates and creates an obligation: the contractual obligation is that form of obligation which springs from agreement. We should therefore try to get a clear idea of these two conceptions, and to this end Savigny's analysis of them may well be considered with reference to the rules of English law.

Requisites of agree- ment.

Savigny,
System,
§ 140. 4.

Two or
more per-
sons,

distinct
intention
common
to both,

§ 1. *Agreement.*

1. Agreement requires for its existence at least two parties. There may be more than two, but inasmuch as agreement is the outcome of consenting minds the idea of plurality is essential to it.¹

2. The parties must have a distinct intention and this must be common to both. Doubt or difference are incompatible with agreement.² The proposition may be illustrated thus:—

Doubt. ‘Will you buy my horse if I am inclined to sell it?’ ‘Very possibly.’

Difference. ‘Will you buy my horse for £50?’ ‘I will give £20 for it.’

¹ “It is a first principle, that in whatever different capacities a person may act, he can never contract with himself, nor maintain an action against himself. He can in no form be both obligor and obligee.” Morton, J., in *Eastman v. Wright*, 6 Pick. (Mass.) 316. *Gorham's Adm'r v. Meacham's Adm'r*, 63 Vt. 231, H. & W. 88.

² *Minneapolis &c. Ry. v. Columbus Rolling Mill*, 119 U. S. 149, H. & W. 74; *Rovegno v. Defferari*, 40 Cal. 459, H. & W. 261; *Rupley v. Daggett*, 74 Ill. 351.

3. The parties must communicate to one another their common intention. Thus a mental assent to an offer cannot constitute an agreement.¹ *A* writes to *X* and offers to buy **X*'s horse for £50. *X* makes up his mind to accept, but never tells *A* of his intention to do so. He cannot complain if *A* buys a horse elsewhere.

known to both,

4. The intention of the parties must refer to legal relations: it must contemplate the assumption of legal rights and duties as opposed to engagements of a social character. It is not easy to prescribe a test which shall distinguish these two sorts of engagements, for an agreement may be reducible to a pecuniary value and yet remain outside the sphere of legal relations. The matter is one which the courts must decide, looking at the conduct of the parties and the circumstances of the case.²

referring to legal relations,

5. The consequences of agreement must affect the parties themselves. Otherwise, the verdict of a jury or the decision of a court sitting *in banco* would satisfy the foregoing requisites of agreement.³

and affecting the parties.

Agreement then is the expression by two or more persons of a common intention to affect their legal relations.

¹ See the *dicta* of Lord Blackburn in the case of *Brogden v. Metropolitan Railway Company* (2 App. Ca. 691). It appears from the Records of the Proceedings in the House of Lords (Appeal Cases, 1877, vol. vii. pp. 98, 106) that Lord Coleridge, C. J., and Brett, J., had in giving judgment in the Common Pleas used language suggesting that a mere mental consent uncommunicated to the other party might create a binding agreement. Lords Selborne and Blackburn express their dissent from such a proposition, the latter very fully and decidedly.

¹ "A mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such, because accompanied by an unevinced mental determination." Folger, J., in *White v. Corlies*, 46 N. Y. 467, H. & W. 7.

² *Keller v. Holderman*, 11 Mich. 248, H. & W. 71; *McClurg v. Terry*, 21 N. J. Eq. 225, H. & W. 72.

³ *O'Brien v. Young*, 95 N. Y. 428, H. & W. 76; *Morley v. Lake Shore Ry.*, 146 U. S. 162.

Agreement
a wider
term than
contract.

It may
not create
obligation.

As to gift
see *Hill v.*
Wilson, L.R.
8 Ch. 886.

Or may
only
create it
remotely.

But agreement as thus defined seems to be a wider term than contract. It includes legal transactions of two kinds besides those which we ordinarily term contracts. These are:—

(1) Agreements the effect of which is concluded so soon as the parties thereto have expressed their common consent in such manner as the law requires. Such are conveyances and gifts, wherein the agreement of the parties effects at once a transfer of rights *in rem*, and leaves no obligation subsisting between them.¹

(2) Agreements which create obligations incidental to transactions of a different and wider sort. These also effect their main object immediately upon the expression of intention; but they differ from simple conveyance and gift in creating further outstanding obligations between the parties, and sometimes in providing for the coming into existence of other obligations, and those not between the original parties to the agreement.

*Marriage, for instance, effects a change of status directly the consent of the parties is expressed before a competent authority; at the same time it creates obligations between the parties which are incidental to the transaction and to the immediate objects of their expression of consent.² [*4]

So too a settlement of property in trust, for persons born and unborn, effects much more than the mere con-

¹ Conveyances, grants and gifts are conveniently spoken of as contracts. Indeed they are held to be contracts under the clause of the Federal constitution prohibiting state legislation "impairing the obligation of contracts." See *Fletcher v. Peck*, 6 Cranch (U. S.), 87, H. & W. 696, where Mr. Chief Justice Marshall says: "A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant." See also *Oregon Pac. R. v. Forrest*, 128 N. Y. 83, 90, where it is said that an executed agreement is valid without any consideration.

² *Maynard v. Hill*, 125 U. S. 190, 210-214.

veyance of a legal estate to the trustee; it imposes on him incidental obligations some of which may not come into existence for a long time; it creates possibilities of obligation between him and persons who are not yet in existence. These obligations are the result of agreement. Yet they are not contract.¹

We need not pause to consider agreements which, though intended to effect legal relations, fail to do so because they fail to satisfy some requirement of the municipal law of the country in which they are made. It remains to ascertain the characteristic of contract as distinguished from the forms of agreement which we have described.

An essential feature of contract is a *promise* by one party to another, or by two parties to one another, to do or forbear from doing certain specified acts. By a *promise* we mean an accepted promise as opposed to an offer of a promise, or, as Austin called it, a *pollicitation*. A promise essential to contract.

An offer must be distinguished from a statement of intention. An offer imports a willingness to be bound to the party to whom it is made; thus, if *A* says to *X* 'I mean to sell one of my sheep if I can get £5 for it,' there is a mere statement which does not admit of being turned into an agreement: but if *A* says to *X* 'I will sell you whichever of my sheep you like to take for £5,' we have an offer. Nature of an offer.

A promise, again, must be distinguished from an offer. An offer becomes a promise by acceptance: until acceptance it may be withdrawn, after acceptance its character is changed. If *A* says to *X* 'I will sell you my horse for £50,' and *X* says 'agreed,' there is a promise by *A* to sell, a promise by *X* to buy, and a contract between the two. Of a promise.

¹ *Sherwood v. Andrews*, 2 Allen (Mass.), 79; *Wyble v. McPheters*, 52 Ind. 393; *Jackson v. Twenty-third St. Ry.*, 88 N. Y. 520.

*To make that sort of agreement which results in contract, there must be (1) an offer, (2) an acceptance [*5] of the offer, resulting in a promise,^a and (3) the law must attach a binding force to the promise, so as to invest it with the character of an obligation. Or we may say that such an agreement consists in an expression of intention by one of two parties, of expectation by the other, wherein the law requires that the intention should be carried out and the expectation fulfilled according to the terms of its expression.

Contract then differs from other forms of agreement in having for its object the creation of an obligation between the parties to the agreement.

§ 2. *Obligation.*

Nature of obligation.

Savigny, Obl. ch. 1. ss. 2-4.

Obligation is a legal bond whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another person or group.

Its characteristics seem to be these.

A control

1. It consists in a control exerciseable by one or both of two persons or groups over the conduct of the other. They are thus bound to one another, by a tie which the Roman lawyers called *vinculum juris*, until the objects of the control are satisfied, when their fulfilment effects a *solutio obligationis*, an unfastening of the legal bond.

needing two parties.

2. Such a relation as has been described necessitates two parties, and these must be definite.

There must be two, for a man cannot be under an obligation to himself, or even to himself in conjunction with others. Where a man borrowed money from a fund in which he and others were jointly interested, and covenanted to repay the money to the joint account, it was held that he could not be sued upon his covenant. 'The covenant to my mind is senseless,' said Pollock, C.B.

Faulkner v. Lowe, 2 Ex. 395, and see Hoyle v. Hoyle, [1893] 1 Ch. (C. A.) 99.

^a It will be shown on *page 12 that an offer may be of an act, and that the promise resulting from acceptance may be made by the acceptor.

‘I do not know what is meant in point of law by a man paying himself.’¹

[*6] *And the persons must be definite. A man cannot be obliged or bound to the entire community: his liabilities to the political society of which he is a member are matter of public, or criminal law. Nor can the whole community be under an *obligation* to him: the correlative right on his part would be a right *in rem*, would constitute property as opposed to obligation. The word Obligation has been unfortunately used in this sense by Austin and Bentham as including the general duty, which the law imposes on all, to respect such rights as the law sanctions. Whether the right is to personal freedom or security, to character, or to those more material objects which we commonly call property, it imposes a corresponding duty on all to forbear from molesting the right. Such a right is a right *in rem*. But it is of the essence of obligation that the liabilities which it imposes are imposed on definite persons, and are themselves definite: the rights which it creates are rights *in personam*.

The parties must be definite.

Holland, Jurisprudence, ed. 7. p. 212.

3. The liabilities of obligation relate to definite acts or forbearances. The freedom of the person bound is limited only in reference to some particular act or series or class of acts. A general control over the conduct of another would affect his status as a free man, but obligation, as was said by Savigny, is to individual freedom what *servitus* is to *dominium*. One may work out the illustration thus: I am owner of a field; my proprietary rights are general and indefinite: my neighbour has a right of way over my field; my rights are to that extent curtailed by his, but his rights are very definite and special. So with obligation. My individual freedom is generally unlimited and indefinite. As with my field so with myself, I may do what I like with it so long as I do not infringe the rights

The liabilities also definite.

¹ *Gorham's Adm'r v. Meacham's Adm'r*, 63 Vt. 231, H. & W. 88; *Eastman v. Wright*, 6 Pick. (Mass.) 316.

of others. But if I contract to do work for *A* by a certain time and for a fixed reward, my general freedom is abridged by the special right of *A* to the performance by me of the stipulated work, and he too is in like manner obliged to receive the work and pay the reward.

The
matter
reducible
to a money
value.

*4. The matter of the obligation, the thing to be done or forborne, must possess or must be reducible [*7] to a pecuniary value, otherwise it would be hard to distinguish legal from moral and social relations. Gratitude for a past kindness cannot be measured by any standard of value, nor can the annoyance or disappointment caused by the breach of a social engagement; and courts of law can only deal with matters to which the parties have attached an importance estimable by the standard of value current in the country in which they are.¹

Obligation then is a control exerciseable by definite persons over definite persons for the purpose of definite acts or forbearances reducible to a money value.

Sources of
obliga-
tion.
Agree-
ment.

We may note here the various sources of obligation.

1. Obligation may arise from agreement. Here we find that form of agreement which constitutes contract. An offer is made by one, accepted by another, so that the same thing is, by mutual consent, intended by the one and expected by the other; and the result of this agreement is a legal tie binding the parties to one another in respect of some future acts or forbearances.

Delict.

2. Obligation may arise from delict. This occurs where a primary right to forbearance has been violated; where, for instance, a right to property, to security, or to character has been violated by trespass, assault, or defamation. The wrong-doer is bound to the injured party to make

¹ The parties may fix a pecuniary value to the doing or forbearing of an act which would otherwise not be reducible to a pecuniary standard; as the forbearing of a personal habit, *Hamer v. Sidway*, 124 N. Y. 538, H. & W. 143; the naming of a child, *Wolford v. Powers*, 85 Ind. 294; or the making of an affidavit, *Brooks v. Ball*, 18 Johns. (N. Y.) 337.

good his breach of duty in such manner as is required by law. Such an obligation is not created by the free-will of the parties, but springs up immediately on the occurrence of the wrongful act.

3. Obligation may arise from breach of contract. While *A* is under promise to *X*, *X* has a right against *A* to the performance of his promise when performance becomes due, and to the maintenance up to that time of the contractual relation. But if *A* breaks his promise, the right of *X* to performance has been violated, and, even if the contract is not discharged, a new obligation springs up, a right of action, *precisely similar in kind to that which arises upon a delict or breach of a duty.¹

Breach of contract.

4. Obligation may arise from the judgment of a court of competent jurisdiction ordering something to be done or forbore by one of two parties in respect of the other. It is an obligation of this character which is unfortunately styled a contract of record in English law. The phrase is unfortunate because it suggests that the obligation springs from agreement, whereas it is really imposed upon the parties *ab extra*.²

Judgment.

5. Obligation may arise from quasi-contract. This is a convenient term for a multifarious class of legal relations which possess this common feature, that without agreement, and without delict or breach of duty on either side, *A* has been compelled to pay something which *X* ought to have paid or *X* has received something which *A* ought to receive. The law in such cases imposes a duty upon *X* to make good to *A* the advantage to which *A* is entitled; and in some cases of this sort, which will be dealt with

Quasi-contract.

¹ It is sometimes difficult to determine whether the obligation arises from delict or breach of contract. See *Rich v. New York Central & C. R.*, 87 N. Y. 382; *Freeman v. Boland*, 14 R. I. 39.

² A judgment is not a contract within the provisions of the Federal constitution prohibiting state legislation impairing the obligation of contracts. *Morley v. Lake Shore Ry.*, 146 U. S. 162; *O'Brien v. Young*, 95 N. Y. 428, H. & W. 76.

later, the practice of pleading has assumed a promise by *X* to *A* and so invested the relation with the semblance of contract.¹

Acts
springing
from
agree-
ment but
wider than
contract.

6. Lastly, obligation may spring from agreement and yet be distinguishable from contract. Of this sort are the obligations incidental to such legal transactions as marriage or the creation of a trust.

It is no doubt possible that contractual obligations may arise incidentally to an agreement which has for its direct object the transfer of property. In the case of a conveyance of land with covenants annexed, or the sale of a chattel with a warranty, the obligation hangs loosely to the conveyance or sale and is so easily distinguishable that one may deal with it as a contract. In cases of trust or marriage the agreement is far-reaching in its objects, and the obligations incidental to it are either contingent or at any rate remote from its main purpose or immediate operation.²

In order, then, to keep clear of other forms of agreement *which may result in obligation we should bear in mind that to create an obligation is the one object [*9] which the parties have in view when they enter into that form of agreement which is called *Contract*.^a

^a In an earlier edition (ed. 2. pp. 9-13) I discussed the views of Mr. Justice Holmes as to the *nature* of the contractual obligation, and of Dr. Holland as to *its source*: but these topics are better suited to a treatise on Jurisprudence than to an elementary book on the law of contract, and I now omit them from the text.

Holmes on
the Common
Law, p. 300.

Mr. Justice Holmes regards a contract as 'the taking of a risk.' He rigorously insists that a man must be held to contemplate the ultimate legal consequences of his conduct, and, in making a promise, to have in view, not its performance but the payment of damages for its breach. I cannot think it desirable to push legal analysis so far as to disregard altogether the aspect in which men view their business transactions. At the same time I feel it difficult to do justice to the argument of Mr. Justice Holmes within the limits which I could assign to myself here.

Jurispru-
dence, ed. 7.
p. 228.

I may say the same of Dr. Holland's view that the law does not require

¹ *Hertzog v. Hertzog*, 29 Pa. St. 465, H. & W. 1; *Dusenbury v. Speir*, 77 N. Y. 144; *Woods v. Ayres*, 39 Mich. 345.

² See *ante*, pp. 4-5, and notes.

And so we are now in a position to attempt a definition of contract, or the result of the concurrence of agreement and obligation: and we may say that it is an *Agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.*¹

Definition
of con-
tract.

contracting parties to have a common intention but only to seem to have one, that the law 'must needs regard not the will itself, but the will as expressed.' Our difference may be shortly stated. He holds that the law does not ask for 'a union of wills' but only for the phenomena of such a union. I hold that the law does require the wills of the parties to be at one, but that when men present all the phenomena of agreement they are not allowed to say that they were not agreed.

For all practical purposes our conflict of view is immaterial. A contract, as a legal transaction, can exist only in such a form as may be perceptible to a court of law. It is only from the words and conduct of the parties that a court can form any conclusion as to their intention. If their words or their acts are inconsistent with any supposition but that they meant to agree, or if one has so spoken or acted as to lead the other necessarily to that conclusion, the court will not permit the obvious construction of words or conduct to be denied. But, after all, it is the intention of the parties which the courts endeavour to ascertain; and it is their intention to agree which is regarded as a necessary inference from words or conduct of a certain sort.

¹ "It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other." Mr. Justice Washington in *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 656. For various definitions collected and discussed see *Justice v. Lang*, 42 N. Y. 493.

PART II.

THE FORMATION OF CONTRACT.

WE have now to ascertain how contracts are made. A part of the definition of contract is that it is an agreement *enforceable at law*: it follows therefore that we must try to analyze the elements of a contract such as the law of England will hold to be binding between the parties to it.

Elements
necessary
to a valid
contract.

These elements appear to consist:—

1. In a distinct communication by the parties to one another of their intention; in other words, in offer and acceptance.

2. In the presence of certain evidence, required by law, of the intention of the parties to affect their legal relations. This evidence is form, or consideration.

3. In the capacity of the parties to make a valid contract.

4. In the genuineness of the consent expressed in offer and acceptance.

5. In the legality of the objects which the contract proposes to effect.

Results of
their
absence.

Where all these elements co-exist, the contract is valid: where any one of them is absent, the contract may be *unenforceable*, that is valid but incapable of proof: or *voidable*, that is capable of being affirmed or rejected at the option of one of the parties: or *void*, that is destitute of legal effect. These three terms may be more fully discussed later.

See ch. v.
ad fin.

CHAPTER I.

Offer and Acceptance.

A CONTRACT consists in an actionable promise or promises. Every such promise involves two parties, a promisor and a promisee, and an expression of common intention or expectation as to the act or forbearance promised. So on the threshold of our subject we must bring the parties together, and must ask, How is this expectation created which the law will not allow to be disappointed? This part of our subject may be set forth briefly in the rules which govern offer and acceptance.

§ 1. *Every contract springs from the acceptance of an offer.*

Every expression of a common intention arrived at by two or more parties is ultimately reducible to question and answer. In speculative matters this would take the form, 'Do you think so and so?' 'I do.' For the purpose of creating obligations it may be represented as, 'Will you do so and so?' 'I will.' If *A* and *X* agree that *A* shall purchase from *X* a property worth £50,000, we can trace the process to a moment at which *X* says to *A*, 'Will you give me £50,000 for my property?' and *A* replies, 'I will.' If *A* takes a sixpenny book from *X*'s book-stall the transaction is reducible to the same elements. *X* in displaying his wares says in act though not in word, 'Will you buy my goods at my price?' and *A*, taking the book with *X*'s cognizance, says in act, 'I will.'

(1) Agreement must originate in offer and acceptance.

So the law is laid down by Blackstone: 'If I take up
[*12] wares from a tradesman without any agreement *of

Comm. bk.
2, c. 30.

price, the law concludes that I contracted to pay their real value.^a

As a promise involves something to be done or forborne it follows that to make a contract, or voluntary obligation, this expression of a common intention must arise from an offer made by one party to another who accepts the offer made, with the result that one or both are bound by a promise or obligatory expression of intention.¹

This process of offer and acceptance may take place in any one of four ways.

How offer
and ac-
ceptance
must be
made.

1. In the offer to make a promise or to accept a promise made, followed in either case by simple assent: this, in English law, applies only to contracts under seal.

2. In the offer of an act for a promise; as if a man offers goods or services which when accepted bind the acceptor to reward him for them.

3. In the offer of a promise for an act; as when a man offers a reward for the doing of a certain thing, which being done he is bound to make good his promise to the doer.

4. In the offer of a promise for a promise, in which case when the offer is accepted by the giving of the promise, the contract consists in outstanding obligations on both sides.

It appears then that offer may assume three forms, the offer to make a promise, the offer to assent to a promise, and the offer of an act. Acceptance may likewise assume three forms, simple assent, the giving of a promise, or the doing of an act.

Principles
of Contract,
6th ed. p. 6.

^a Sir F. Pollock suggests that there are modes of forming agreement otherwise than by question and answer. But I still think that question and answer, in however elliptical a form, are the inevitable mode of coming to agreement, and that to such a form his exceptions are reducible.

¹ *White v. Corlies*, 46 N. Y. 467, H. & W. 7; *Thruston v. Thornton*, 1 Cush. (Mass.) 89; *McDonald v. Bewick*, 51 Mich. 79; *Füch v. Snedaker*, 38 N. Y. 248, H. & W. 62.

But the foregoing modes of offer and acceptance need explanation.

1. The first is in English law applicable only to such contracts as are made under seal, for no promise, not under Illustrations.
 [*13] *seal, is binding unless the promisor obtains something from the promisee in return for his promise. This something, which may be an act, a forbearance, or a promise, is called consideration.

The offer may take the form, 'I will promise you £50 if you will accept it,' or, 'I will accept £50 if you will promise it to me.' In either case the promise must be made under seal if it is to bind the promisor.¹

In the first case assent is needed to turn the offer of a promise into a contract: for a man cannot be forced to accept a benefit. Townson v. Tickell,
3 B. & Ald.
87.

In the second case acceptance takes the form of a promise to which assent has been secured by the terms of the offer.

2. A man gets into a public omnibus at one end of Oxford Street and is carried to the other. The presence of the omnibus is a constant offer by its proprietors of such services upon certain terms; they offer an act for a promise; and the man who accepts these services promises by his acceptance to pay the fare at the end of the journey.²

3. A man who loses his dog offers by advertisement a reward of £5 to any one who will bring the dog safe home; he offers a promise for an act; and when *X*, knowing of the offer, brings the dog safe home the act is done and the promise becomes binding.³

4. *A* offers *X* to pay him a certain sum on a future day if *X* will promise to perform certain services for him before that day. When *X* makes the promise asked for he accepts the promise offered, and both parties are bound, the one to

¹ *Krell v. Codman*, 154 Mass. 454; *Williams v. Forbes*, 114 Ill. 167.

² *Day v. Caton*, 119 Mass. 513; *Fogg v. Portsmouth Athenæum*, 44 N. H. 115, H. & W. 10.

³ *Reif v. Paige*, 55 Wis. 496; *Pierson v. Morch*, 82 N. Y. 503.

do the work, the other to allow him to do it and to pay for it.¹

Difference between contracts on executed and executory considerations.

It will be observed that cases 2 and 3 differ from 4 in an important respect. In 2 and 3 the contract does not come into existence until one party to it has done all that he can be required to do. It is performance on one side which makes obligatory the promise of the other; the outstanding obligation is all on one side. In 4 each party is bound to some act or forbearance which, at the time of entering into *the contract, is future: there is an outstanding obli- [*14] gation on each side.

In case 1 the promisee alone is benefited: in cases 2 and 3 the promisor and promisee alike take benefit, but the promise does not come into existence until the promisor has obtained all that he is to get under the contract: in case 4 the benefits contemplated by the parties are expressed in their mutual promises. We may, if we please, call 1, 2, 3, *unilateral*, and 4 *bilateral* contracts.²

Where, as in cases 2 and 3, it is the doing of the act which concludes the contract, then the act so done is called an *executed*^a or present consideration for the promise. Where a promise is given for a promise, each forming the consideration for the other, such a consideration is said to be *executory* or future.

^a The words *executed* and *executory* are used in three different senses in relation to contract, according to the substantive with which the adjective is joined.

Executed consideration as opposed to executory means *present* as opposed to *future*, an act as opposed to a promise.

Executed contract means a contract performed wholly on one side, while an executory contract is one which is either wholly unperformed or in which there remains something to be done on both sides.

Executed contract of sale means a *bargain and sale* which has passed the property in the thing sold, while executory contracts of sale are contracts as opposed to conveyances, and create rights *in personam* to a fulfilment of their terms instead of rights *in rem* to an enjoyment of the property passed.

Leake, ed. 8. p. 538.
Parke, B., in Foster v. Dawber, 6 Exch. 551.

Chalmers, Sale of Goods Act. 1893, p. 6.

¹ *White v. Corlies*, 46 N. Y. 467, H. & W. 7.

² Langdell, Summary of Law of Cont. ss. 183-187.

§ 2. *An offer or its acceptance or both may be made either by words or by conduct.*

From what has been said as to the possible forms of offer and acceptance it will appear that conduct may take the place of written or spoken words in the making of contracts.¹

(2) Contract may arise from conduct.

If *A* asks *X* to work for him for hire, *X* may accept simply by doing the work, unless *A* has in his offer prescribed any form of acceptance.

Or, again, if *A* allows *X* to work for him under such circumstances that no reasonable man would suppose [*15] that *X* meant to do the work for nothing, *A* will be liable to pay for it. The doing of the work is the offer, the permission to do it, or the acquiescence in its being done, is the acceptance.²

Paynter v. Williams, 1 C. & M. 810; Leake, ed. 3. p. 40.

On the same principle, if *A* sends goods to *X*'s house and *X* accepts or uses the goods, *X* will be liable on an implied contract to pay what the goods are worth. The offer is made by sending the goods, the acceptance by their use or consumption, which is in fact a promise to pay their price.³

Hart v. Mills, 15 M. & W. 87.

A ordered of *X* a publication to be delivered in twenty-four monthly numbers. He received eight numbers and

¹ "Nothing is plainer than the proposition, that the distinction between express and implied contracts lies, not in the nature of the undertaking, but in the mode of proof." Somerville, J., in *Montgomery v. Montgomery Water Works*, 77 Ala. 248. "The term 'tacit contract,' suggested by Mr. Austin, describes a genuine agreement of this nature better than the phrase 'an implied contract'; for the latter expression is sometimes used to designate legal obligations, which, in fact, are not contracts at all, but are considered so only by legal fiction, for the sake of the remedy." Smith, J., in *Bixby v. Moor*, 51 N. H. 402, H. & W. 378.

² *Day v. Caton*, 119 Mass. 513; *Curry v. Curry*, 114 Pa. St. 367; *Hertzog v. Hertzog*, 29 Pa. St. 465, H. & W. 1; *Cicotte v. Church of St. Anne*, 60 Mich. 552.

³ *Indiana Mfg. Co. v. Hayes*, 155 Pa. St. 160; *Hobbs v. Massasoit Whip Co.*, 158 Mass. 194, H. & W. 24.

then refused to receive more. No action could be brought upon the original contract for want of writing in compliance with the Statute of Frauds, but it was held that there was an offer and acceptance of each of the eight numbers received, creating a promise to pay for them.¹

Mavor v.
Pyne,
8 Bing. 289.

Hammers-
ley v. de
Biel, 12 Cl.
& F. 62.
Synge v.
Synge
[1894],
1 Q. B. 466.

Offers to grant property by deed or dispose of it by will in favour of a man or woman in consideration of his or her marriage are accepted and become binding upon the marriage of the person to whom the offer was made, whether it be made by a third party or is a part of the terms on which two persons agree to marry.^a

Inferences
deducible
from
conduct.

Sometimes the inference from conduct is not so direct as in the cases just referred to; but the conduct of the parties is inexplicable on any other ground than that there was a contract between them, and a jury may then infer that such a contract was made.

19 Q. B. D.
845.

In *Crears v. Hunter*, *X*'s father being indebted to *A*, *X* gave to *A* a promissory note for the amount due, with interest payable half-yearly at 5 per cent., and *A* thereupon forbore to sue the father for his debt. The father died and *A* sued *X* on the note. Was there evidence to connect the making of the note with the forbearance to sue? If so, such forbearance would be consideration for the note. 'It was argued,' said Lord Esher, M.R., 'that the request to forbear must be express. But it seems to me that whether the request is express or is to be inferred from circumstances is a mere question of evidence. If a request is to be implied from circumstances it is the same as if there was an express request.' The Court of Appeal held that the evidence was sufficient

Oldershaw
v. King,
2 H. & N.
517.

^a The facts stated in *Synge v. Synge* point to the inference that the promise to devise property was a term in the contract to marry: but the language of the court makes no reservation for cases in which there are promises to marry, and a subsequent promise on one side to settle property. For this latter there would seem to be no consideration, for the parties are already bound to marry (*post*, *p. 85 et sq.).

¹ *Fogg v. Portsmouth Athenæum*, 44 N. H. 115, H. & W. 10.

for the jury to infer that the understanding between the plaintiff and defendant was that, if the plaintiff would give time to the father, the defendant would make himself responsible.

§ 3. *An offer is made when, and not until, it is communicated to the offeree.*

This rule is not the truism that it appears.

(3) Offer must be communicated.

(a) *X* offers a promise for an act. *A* does the act in ignorance of the offer. Can he claim performance of the promise?

4 B. & A. 621.

The only English authority on this point is *Williams v. Carwardine*, where reward was offered for such information as might lead to the discovery of a murder, and the plaintiff gave information 'believing she had not long to live, and to ease her conscience.' Afterwards she recovered, and sued for the reward. It was held that she was entitled to it. Her claim was not contested on the ground that she was ignorant of the offer, but because the reward offered was not the motive of her act. The report is silent as to her knowledge of the offer, and the judgments delivered only show that the motive of compliance with the terms of the offer was immaterial.

(a) Fortuitous acceptance ineffectual.

An American case — *Fitch v. Snedaker* — is directly in point. It is there laid down that a reward cannot be claimed by one who did not know that it had been offered. The decision seems undoubtedly correct in principle. One who does an act for which a reward has been offered, in ignorance of the offer, cannot say either that there was a *consensus* of wills *between him and the offeror, or [*17] that his conduct was affected by the promise offered. On no view of contract could he set up a right of action.^{a 1}

88 N. Y. 248.

^a I do not insert in the text the recent case of *Gibbons v. Proctor*, because, with deference, I believe the case to be wrongly decided.

[1892] 64 L. T. 594.

Gibbons, a constable, informed another constable that a criminal for whom

¹ The American cases are not agreed as to whether one who performs an act contemplated in the offer of a reward, but in ignorance

(b) A does work for X without the request or knowledge of X. Can he sue for the value of his work?

(b) Silence does not give consent,

A man cannot be forced to accept and pay for that which he has had no opportunity of rejecting. Under such circumstances acquiescence cannot be presumed from silence. Where the offer is not communicated to the party to whom it is *intended to be made, there is no opportunity of rejection; hence there is no pre-^[*18]sumption of acquiescence.¹

search was being made was to be found at a certain place. The information was given between 2 A.M. and 3 A.M. on the 29th of May, and the plaintiff desired his colleague to forward it to the proper quarter.

Between 10 A.M. and 11 A.M. on the same day, Proctor gave orders for printing a reward for the transmission to the superintendent of police of such information as would lead to the discovery of the criminal. The handbills when printed were ordered to be sent to the superintendent of police to whom Gibbons had desired his information to be sent. These handbills were despatched in the evening, unopened, by the superintendent to the various police stations; and on the same evening the information was forwarded by post to the superintendent.

By the time he received it, on the morning of the 30th, the handbills had been opened and displayed, and as the information led to the discovery and conviction of the criminal, Gibbons was held entitled to the reward.

If this decision is correct it strikes at some fundamental principles of the law of contract, for one must note that:—

1. The information was supplied not merely in ignorance of the offer of reward, but before the offer was made. It was suggested by the court that each successive constable through whom the information passed was the agent of Gibbons, and that thus the offer was not accepted till after it was made. But the agents, if they were such, had no authority to accept an offer, and did no more than transmit information; and the last agent, if such he was, sent the information by post some ten hours before the handbills were published.

2. The constable did no more than, in the ordinary course of his duty, he was bound to do; and so furnished no consideration for the promise of reward. In *England v. Davidson* it was clearly assumed that a constable must do more than this to obtain a reward.

3. Even if he had gone beyond the ordinary course of his duty, the act was done before the offer was made, and so the consideration was past.

of the offer, can recover the reward. *Fitch v. Snedaker*, 38 N. Y. 248, II. & W. 62, cited by the author, is further supported by *Howland v. Lounds*, 51 N. Y. 604, and *Stamper v. Temple*, 6 Humph. (Tenn.) 113. But *Dawkins v. Sappington*, 26 Ind. 199, H. & W. 65, holds otherwise, on "considerations of morality and public policy," and is supported by *Auditor v. Ballard*, 9 Bush. (Ky.) 572, and *Russell v. Stewart*, 44 Vt. 170.

¹ *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, H. & W. 14; *James v. O'Driscoll*, 2 Bay (S. C.), 101; *Thornton v. Village of Sturgis*, 38 Mich. 639.

Taylor was engaged to command *Laird's* ship; he threw up his command in the course of the expedition but helped to work the vessel home, and then claimed reward for services thus rendered. It was held that he could not recover. Evidence 'of a recognition or acceptance of services may be sufficient to show an implied contract to pay for them, *if at the time the defendant had power to refuse or accept the services.*' Here the defendant never had the option of accepting or refusing the services while they were being rendered; he repudiated them when he became aware of them. The plaintiff's offer being uncommunicated, did not admit of acceptance, and could give him no rights against the party to whom it was addressed.

where
offer is un-
communi-
cated.

Taylor v.
Laird, 25
L. J. Ex.
329.

(c) Where an offer consists of various terms, some of which do not appear on the face of it, to what extent is an acceptor bound by terms the purport of which he was not aware?

(c) Igno-
rance of
terms.

This question is answered, and the cases on the subject carefully summarized by Stephen, J., in *Watkins v. Rymill*.

10 Q. B. D.
178.

'A great number of contracts are, in the present state of society, made by the delivery by one of the contracting parties to the other of a document in a common form stating the terms by which the person delivering it will enter into the proposed contract. *Such a form constitutes the offer of the party who tenders it.* If the form is accepted without objection by the person to whom it is tendered he is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents, or not.'

Railway companies, for instance, make continuous offers to carry or to take care of goods on certain conditions. The traveller who takes a ticket for a journey, or for luggage left at a cloak-room, accepts an offer containing many terms. A very prudent man with abundance of leisure would perhaps inquire into the terms before taking a ticket. Of the mass of mankind some know that there are conditions and assume that they are fair, the rest do not think about the matter. *The general rule, [*19] settled after the question had presented itself to the

General
rule.

courts in many forms, is laid down in the passage above cited. We may take it that if a man accepts a document which purports to contain the terms of an offer, all the terms have been communicated to him, though he may not choose to inform himself of their tenor or even of their existence.¹ The exceptions to this rule, apart from such a wilful mis-statement of conditions as would amount to fraud, and apart from conditions which a court would hold to be unreasonable or oppressive, fall under two heads.

Excep-
tions.

The offer may contain on its face the terms of a complete contract, and then the acceptor will not be bound by any other terms intended to be included in it.

(a) Offer
ostensibly
complete.
L. R. 2 H. L.
Sc. App. 470.

Such a case was *Henderson v. Stevenson*. The plaintiff purchased of the defendant company a ticket by steamer from Dublin to Whitehaven. On the face of the ticket were these words only, 'Dublin to Whitehaven'; on the back was an intimation that the company incurred no liability for loss, injury, or delay to the passenger or his luggage. The vessel was wrecked by the fault of the company's servants and the plaintiff's luggage lost. The House of Lords decided that the company was liable to make good the loss, since the plaintiff could not be held to have assented to a term 'which he has not seen, of which he knows nothing, and *which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him.*'²

¹ Where the document delivered purports to be, or would by the reasonable man be understood to be, a contract, and not a mere check or voucher, its acceptance is an acceptance of all the terms and stipulations contained in it. *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, H. & W. 15; *Zimmer v. New York Central &c. R.*, 137 N. Y. 460; *Ballou v. Earle*, 17 R. I. 441; *Boylan v. Hot Springs R.*, 132 U. S. 146. But where the document purports to be, and would by the reasonable man be understood to be, merely a check or voucher, and not a contract, its acceptance does not imply assent to terms and stipulations contained in it, unless the acceptor in fact knew the contents. *Malone v. Boston &c. R.*, 12 Gray (Mass.), 388, H. & W. 19; *Blossom v. Dodd*, 43 N. Y. 264.

² *Brown v. Eastern R.*, 11 Cush. (Mass.) 97.

Or again, the plaintiff may assert, not that the offer was complete upon its face, but that the mode of calling his attention to the terms which it included was not such as to amount to reasonable notice.

(3) Notice of terms insufficient.

Parker v. South Eastern Railway Company was a case of deposit of luggage in a cloak-room on terms contained in a ticket. The conditions limiting the liability of the company were printed on the back of the ticket and were referred to by the words 'See back' on the face of the ticket. The plaintiff, while he admitted a knowledge that there was writing on the *ticket, denied all [*20] knowledge that the writing contained conditions. The Court of Appeal held that he was bound by the condition if a jury was of opinion that the ticket amounted to a reasonable notice of its existence.^{a 1}

2 C. P. D. 416.

There is one exception to the inoperative character of an uncommunicated offer: this is the case of an offer under seal. Yet the party making such an offer cannot be said to be bound by a contract, for this can arise only where an offer is accepted. He would seem to have made an offer which he cannot withdraw: and so the matter is best dealt with under the head of the revocation of offers.

Exceptional nature of offer under seal.

§ 4. *Acceptance must be communicated by words or conduct.*

Acceptance means communicated acceptance, and whether or no the communication reaches the offeror (as to which more has to be said presently), it must be something more than a mere mental assent.

(4) Acceptance must be manifested.

^a The case of *Rowntree v. Richardson and others* (ix T. L. R. 297) is instructive as to the provinces of court and jury in these matters. A passenger sued for injuries sustained by the negligence of a steamship company; the company had limited its liability by a clause on the ticket which was printed in small type and further obscured by words stamped across it in red ink. The jury found that the attention of the plaintiff had not been fairly called to the limitation of liability, and the court of Appeal refused to disturb this verdict though the Lords Justices said that if they had decided the question of fact in the first instance they should have considered the notice sufficient.

¹ *Malone v. Boston &c. R., supra.*

In an old case it was argued that where the produce of a field was offered to a man at a certain price if he was pleased with it on inspection, the property passed when he had seen and approved of the subject of the sale. But Brian, C.J., said:—

Year Book,
17 Ed. IV. 1.

‘It seems to me the plea is not good without showing that he had certified the other of his pleasure; for it is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man; but if you had agreed that if the bargain pleased then you should have signified it to such an one, then I grant you need not have done more, for it is matter of fact.’

App. Ca. 2.
692.

*This *dictum* was quoted with approval by Lord Blackburn in the House of Lords in support of the [*21] rule that a contract is formed when the acceptor has done something to signify his intention to accept, not when he has made up his mind to do so.

Mental
accept-
ance in-
effectual.

A modern case will show that silent consent does not amount to acceptance.

Felthouse v.
Bindley, 11
C. B., N. S.
869.

Felthouse offered by letter to buy his nephew's horse for £30 15s., adding, ‘If I hear no more about him I shall consider the horse is mine at £30 15s.’ No answer was returned to this letter, but the nephew told Bindley, an auctioneer, to keep the horse out of a sale of his farm stock, as it was sold to his uncle Felthouse. Bindley sold the horse by mistake, and Felthouse sued him for wrongful dealing with his property. The court held that as the nephew had never signified to Felthouse his acceptance of the offer, there was no contract of sale, and that the horse did not belong to Felthouse at the time of the auctioneer's dealings with it.

Here silence did not amount to consent. Felthouse had given no intimation of any mode in which acceptance of his offer should be signified, so that the nephew's statement to the auctioneer that the horse was sold to Felthouse could not be regarded as a communication.¹

¹ Silence does not give consent. *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6, H. & W. 21. Though otherwise if circumstances impose upon

§ 5. *Acceptance is communicated when it is made in a manner prescribed, or indicated by the offeror.*

(5) **How acceptance may be manifested.**

Contract is formed by the acceptance of an offer. When the offer is accepted it becomes a promise: till it is accepted neither party is bound, and the offer may be revoked by due notice of revocation to the party to whom it was made. Acceptance is necessarily irrevocable, for it is acceptance that binds the parties.

Effect of acceptance.

An offer is accepted when the acceptance is communicated, and we have seen that this means more than a tacit formation of intention. There must be some overt act or speech to give *evidence of that intention. But there [*22] is this marked difference between communication of offer and communication of acceptance, that whereas an offer is not held to be communicated until it is brought to the knowledge of the offeree, it is not universally necessary that a communicated acceptance should come to the knowledge of the offeror in order to make a contract.

Communication of acceptance, differs from communication of offer.

In such cases two things are necessary. Some overt act must be done or words spoken by the offeree which are evidence of an intention to accept, and which satisfy the conditions laid down in the last section. And this must take place in consequence of an express or implied intimation from the offeror that such a mode of acceptance will suffice.

Requisites of communication.

The law on this subject was thus stated by Bowen, L.J., in the *Carbolic Smoke Ball* case.

[1898] 1 Q. B. (C. A.) 269.

‘One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who made the offer, in order that the two minds may come together. Unless this is so the two minds may be apart, and there is not that *consensus*

the offeree the duty to speak. *Hobbs v. Massasoit Whip Co.*, 158 Mass. 194, H. & W. 24; *Emery v. Cobbey*, 27 Neb. 621. Conduct which is as well referable to one state of mind as another, or which is indecisive, is not assent. *White v. Corlies*, 46 N. Y. 467, H. & W. 7; *Stensgaard v. Smith*, 43 Minn. 11, H. & W. 26; *Lancaster v. Elliott*, 28 Mo. App. 86.

which is necessary according to the rules of English law — I say nothing about the laws of other countries — to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice *to himself* if he thinks it desirable to do so: and I suppose there can be no doubt that where a person in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.'

From this statement of the law we may conclude that we must look to the nature and the terms of the offer if any question should arise as to the adequacy of the methods adopted to communicate the acceptance.¹

Notice to
offeror
when re-
quired.

But we have to distinguish the cases in which the offeror *asks that the acceptance should take the form of the doing of an act, and the cases in which [*23] he asks that the acceptance should be communicated to him in some specified manner, by words or conduct.

In the former class of cases it is sometimes impossible for the offeree to express his acceptance otherwise than by performance of his part of the contract. An offer of reward for the supply of information or for the recovery of a lost article does not contemplate an intimation from every person who sees the offer that he intends to search for the information or for the article: he may have already found or become possessed of the thing required, and can do no more than transmit it to the offeror. This is especially the case with what are called general offers, offers made to unascertained persons, wherein performance is expressly or impliedly indicated as a mode of acceptance.

¹ *Reif v. Paige*, 55 Wis. 496.

But when a specified individual receives an offer capable of acceptance by performance we need to consider more carefully the nature and terms of the offer, for they may be such as to demand notice of acceptance.

A told *X* by letter that he was prepared to guarantee advances made by *X* to *M*. *X* without notice to *A* advanced money to *M* and afterwards charged *A* upon *M*'s default. It was held that *X* was bound to notify his acceptance to *A*, and that for want of such notification no contract had been made.¹

McIver v. Richardson,
1 M. & S.
557.

When we pass from offers of a promise for an act to offers of a promise for a promise, that is from offers capable of being accepted by performance to offers which necessitate for their acceptance an expression of intention to accept, we have no longer to consider whether the offeror asks for any notification at all, but what responsibility he takes upon himself as to the mode in which the acceptance should be communicated. If he requires or suggests a mode of acceptance which proves to be a nugatory or insufficient means of communication he does so at his own risk.

We obtain a good illustration of this rule in the case of [*24] *contracts made by post. We may assume that an offer made by post invites an answer by post unless the intention should be otherwise definitely expressed.

Acceptance of offer by post.

‘The post office is the ordinary mode of communication, and every person who gives any one the right to communicate with him, gives the right to communicate in an ordinary manner.’

Household Fire Ins. Co. v. Grant, 4 Ex. D. 216, at p. 233.

The first thing to bear in mind is that an offer made to one who is not in immediate communication with the

When and how it must be made.

¹ Does the acceptance of an offer of guaranty need to be express, or may it be implied from the giving of credit? (1) As to guaranties of existing debts or contemporaneous ones where the guarantor has knowledge that the guaranty is being acted upon, no express notification is necessary. *Davis &c. Co. v. Jones*, 61 Mo. 409; *Davis v. Wells*, 104 U. S. 159. (2) Where the offer is from the guaratee and the acceptance from the guarantor, no further notice is required.

offeror remains open and available for acceptance until the lapse of such a time as is prescribed by the offeror, or is reasonable as regards the nature of the transaction. During this time the offer is a continuing offer and may be turned into a contract by acceptance. This is clearly laid down in *Adams v. Lindsell*. Lindsell offered to sell wool to Adams by letter dated 2nd Sept. 1817, '*receiving your answer in course of post.*' He misdirected the letter, so that Adams did not receive it until the 5th. Adams posted a letter of acceptance on the evening of the 5th, but Lindsell meanwhile had sold the wool to others. Adams sued for a breach of the contract made by the letters of offer and acceptance, and it was argued on behalf of Lindsell that there was no contract between the parties till the letter of acceptance was actually received. But the court said:—

'If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs until the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is concluded by the acceptance of it by the latter.'

Adams v. Lindsell establishes two points, first that the offer remains open for acceptance during a time prescribed by the offeror or reasonable under the circumstances; and secondly, that an acceptance in the mode indicated by the offeror concludes the contract.

Cooke v. Orne, 37 Ill. 186; *Davis v. Wells*, *supra*. (3) Where the guaranty relates to future advances there is a conflict of opinion. One class of cases holds express notice of the acceptance necessary. *Davis v. Wells*, *supra*; *Mussey v. Rayner*, 22 Pick. (Mass.) 223. Another class of cases holds it necessary where the amount of the proposed advance is uncertain, but unnecessary where it is certain. *Snyder v. Click*, 112 Ind. 293. A third class of cases holds notice to be generally unnecessary. *Powers v. Bumcratz*, 12 Oh. St. 273; *Union Bank v. Coster*, 3 N. Y. 203; *Crittenden v. Fiske*, 46 Mich. 70.

[*25] *The courts have shown some hesitation in applying this rule to cases where the letter of acceptance has been lost or delayed in transmission, and though the law is now settled in accordance with the principle set forth at the head of this section, it is worth noting the stages by which the result has been reached.

Effect of
lost ac-
ceptance.

Dunlop v. Higgins was a case in which a letter of acceptance was delayed in the post, and the offeror repudiated the contract when the acceptance arrived. Lord Cottenham, delivering the judgment of the House of Lords, laid down a general rule:—

1 H. L. C.
551.

‘If the party accepting the offer puts his letter into the post on the correct day has he not done everything that he was bound to do? How can he be responsible for that over which he has no control?’

This language covers the case of a letter lost in the post, and this was what happened in *Colson’s* case. Colson applied for an allotment of shares: an allotment letter was posted and never reached him: later a duplicate letter was sent to him which he refused to treat as an acceptance, and the Court of Exchequer held that he was not bound, considering that *Dunlop v. Higgins* was distinguishable and that the decision did not apply to the case of a lost letter.

L. R. 6 Ex.
108.

Harris’ case was one in which a letter of acceptance was posted a few hours earlier than a letter containing a revocation of the offer. It was held that the contract was completed, beyond possibility of revocation, when the letter of acceptance was posted. But James and Mellish, L.JJ., were careful to reserve their opinion as to the case of a lost letter of acceptance.

L. R. 7 Ch.
557.

The matter came to a final decision in the *Household Fire Insurance Co. v. Grant*. An offer was made to take shares under circumstances indicating that the answer was to come by post: it was accepted by letter, the letter never reached the offeror, and the Court of Appeal held that he was nevertheless liable as a shareholder.

4 Ex. D. 215.

*‘As soon as the letter of acceptance is delivered to the post-office the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offeror himself *as his agent to deliver the offer and receive the acceptance.*’^a [*26]

Per Thesiger, L.J.

These last words supply an intelligible ground for throwing upon the offeror, rather than the acceptor, the risk of an acceptance going wrong. If the offeree accepts in the manner which the offeror requires or suggests, he does as though he put his acceptance into the hands of a servant or representative of the offeror. We thus get a general rule.

[1892] 2 Ch. 27, C. A. 83.

Yet in the recent case of *Henthorn v. Fraser* the Court of Appeal seemed disposed to abandon the idea of such an implied suggestion as to the mode of acceptance. A written offer, delivered by hand, was accepted by post; it was held that the contract was concluded from the moment of such acceptance. Lord Herschell said:—

‘I should prefer to state the rule thus: where the circumstances are such that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.’

But the cases of contracts made by post are merely an illustration of the general rule that the offeror takes the risk as to the effectiveness of communication if the acceptance is made in a manner indicated by the offeror as sufficient. It would be hard on the acceptor if, having done all that was required of him, he lost the benefit of a contract because the *mode of communication chosen by the offeror turned out to be insufficient.¹ [*27]

20 Q. B. D. 640.

^a The rule that the contract is made by the despatch of a letter or telegram of acceptance is curiously illustrated by the case of *Cowan v. O'Connor*. A contract was made by two telegrams of offer and acceptance. The telegram of acceptance was sent from the city, and the sender sued on the contract in

¹ Except in Massachusetts, the American cases agree with the conclusion of the English courts, that a contract is complete as soon as the letter of acceptance is mailed, if the offer reasonably contemplated that mode of acceptance. *Tayloe v. Merchants' Fire Ins. Co.*,

Suppose that *X* sends an offer to *A* by messenger across a lake with a request that *A* if he accepts will at a certain hour fire a gun or light a fire. Why should *A* suffer if a storm render the gun inaudible, or a fog intercept the light of the fire?

Offeror determines mode of acceptance.

If *X* sends an offer to *A* by messenger with a request for a written answer by bearer, is it *A*'s fault if the letter of acceptance is stolen from the bearer's pocket? If *X* has asked for a verbal answer and the messenger who is told to say 'yes' is struck with paralysis on the way home, it would seem unreasonable to say that no contract has been made.

Hebb's case shows that an acceptance is not communicated *unless* made as indicated by the offeror. *Hebb* applied to the agent of a company for shares; the directors allotted shares to him, but sent the allotment letter to their own agent. Before the agent delivered the letter *Hebb* withdrew his offer. It was held that 'if Mr. *Hebb* had authorized the agent of the company to accept the allotment on his behalf there would have been a binding contract, but he gave no such authority.' Communication by the directors to their own agent was no communication to *Hebb*. Consequently he was entitled to withdraw his offer.

L. R. 4 Eq. 9.

There is a result of this view of acceptance which has the Lord Mayor's Court. Application was made for a writ of prohibition to the Lord Mayor's Court on the ground that the amount in issue exceeded £50, that the whole cause of action must therefore arise in the city, and that the offer was made from outside. The court held that the contract, whether by letter or telegram, is made at the place from which the acceptance is sent.

9 How. (U. S.) 390, H. & W. 29; *Patrick v. Bowman*, 149 U. S. 411; *Macier v. Frith*, 6 Wend. (N. Y.) 103; *Vassar v. Camp*, 11 N. Y. 441; *Wheat v. Cross*, 31 Md. 99; *Perry v. Mount Hope Iron Co.*, 15 R. I. 380. In Massachusetts the holding is otherwise. *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278; *Lewis v. Browning*, 130 Mass. 173. If the offer makes the receipt of the answer the required mode of acceptance, nothing short of that will do. *Haas v. Myers*, 111 Ill. 421; *Lewis v. Browning*, 130 Mass. 173. Telegrams stand upon the same footing. *Trevor v. Wood*, 36 N. Y. 307.

Can acceptance be revoked?

been the subject of criticism. Acceptance concludes the contract; so if acceptance takes place when a letter is put into the post-office, a telegram revoking the acceptance would be inoperative, though it reached the offeror before the letter. It is not easy to see how the English courts could now decide otherwise. Nor is it easy to see that any hardship would thence arise. The offeree need not accept at all: or he may send a qualified acceptance, 'I accept unless you get a revocation from me by telegram before this reaches you:' or he may telegraph a request for more time to consider. If he chooses to send an *unconditional acceptance there is no reason why he should have an opportunity of changing his mind which he would not have enjoyed if the contract had been made '*inter praesentes*.'^a

§ 6. *Offer creates no legal rights until acceptance, but may lapse or be revoked.*

(6) Lapse and revocation of offer

Acceptance is to offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone. But the powder may have lain till it has become damp, or the man who laid the train may remove it before the match is applied. So an offer may lapse for want of acceptance, or be revoked before acceptance.

Lapse.

(i) Lapse:
(a) Death of parties.

(a) The death of either party before acceptance causes an offer to lapse. An acceptance communicated to the representatives of the offeror cannot bind them. Nor can the representatives of a deceased offeree accept the offer on behalf of his estate.¹

^a That unhappy experiment in codification, the Indian Contract Act, has characteristically adopted this pseudo-scientific view of acceptance.

¹ The communication of an acceptance is complete as against the proposer

¹ *Pratt v. Trustees*, 93 Ill. 475, H. & W. 35; *Twenty-third Street Baptist Church v. Cornell*, 117 N. Y. 601. So also insanity. *Beach v. First M. E. Church*, 96 Ill. 177

(b) It has been shown that acceptance is communicated if made in a manner prescribed or indicated by the offeror. (b) Failure to accept in manners prescribed;

If he should merely indicate, or suggest a mode of acceptance, it would seem that the offeree would not be bound to this mode so long as he used one which did not cause delay. An offer made by post might be accepted by telegram, or by messenger sent by train.

But if a mode of acceptance is prescribed and the offeree [*29] *departs from this, it is open to the offeror to treat the acceptance as a nullity.

Eliason offered to buy flour of Henshaw, requesting that an answer should be sent by the wagon which brought the offer. Henshaw sent a letter of acceptance by mail, thinking that this would reach Eliason more speedily. He was wrong, and the Supreme Court of the United States held that Eliason was entitled to refuse to purchase. Eliason v. Henshaw, 4 Wheaton, 225. Finch, Sel. Cases, 41. [H. & W. 38.]

‘It is an undeniable principle of the law of contract, that an offer of a bargain by one person to another imposes no obligation upon the former, until it is accepted by the latter according to the terms in which the offer was made. Any qualification of or departure from these terms invalidates the offer unless the same be agreed to by the person who made it.’

(c) Sometimes the parties fix a time within which an offer is to remain open; more often it is left to a court of law, in the event of litigation, to say what is a reasonable time within which an offer may be accepted. Instances of a prescribed time are readily supplied. ‘This offer to be left over till Friday, 9 A.M., 12th June,’ leaves it open to the offeror to revoke, or the offeree to accept, the offer at any time up to the date named. (c) or within time prescribed.

Dickinson v. Dodds, 2 Ch. D. 463.

when it is put in course of transmission to him so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer.’ I. C. A. c. 1, § 4.

What is to happen if the letter of acceptance is lost? Is the proposer to be for ever bound though the acceptor is free?

¹ “A limitation of time for which a standing offer is to run is equivalent to the withdrawal of the offer at the end of the time named.” *Longworth v. Mitchell*, 26 Oh. St. 334, 342. See also *Maclay v. Harvey*, 90 Ill. 525, H. & W. 41.

G. N. R. Co.
v. Witham,
L. R. 9 C. P.
16.
Offord v.
Davies, 12
C. B., N. S.
748.

An offer to supply goods of a certain sort at a certain price for a year from the present date—an offer to guarantee the payment of any bills discounted for a third party for a year from the present date—are offers which may be turned into contracts by the giving of an order in the one case, the discount of bills in the other; such offers may be revoked at any time, except as regards orders already given or bills already discounted, and they will in any event lapse at the end of a year from the date of offer.¹

A promise to keep an offer open for a certain time would only become binding if the party making the offer were to get some benefit by keeping it open, such as a higher price in the event of acceptance.²

L. R. 1 Exch.
109:

An instance of an offer lapsing by the efflux of a reasonable *time is supplied by the case of the *Ramsgate Hotel Co. v. Montefiore*. Montefiore offered by letter [*30] dated the 28th of June to purchase shares in the company. No answer was made to him until the 23rd of November, when he was informed that shares were allotted to him. He refused to accept them, and it was held that his offer had lapsed by reason of the delay of the company in notifying their acceptance.³

Revocation.

(ii.) **Revocation:** An offer may be revoked at any time before acceptance: it is made irrevocable by acceptance.⁴

¹ *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45; *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, H. & W. 50.

² *Weaver v. Burr*, 31 W. Va. 736; *Hayes v. O'Brien*, 149 Ill. 403. A purchase of one lot under a standing offer may be treated as a consideration for keeping the offer open during the rest of the time stipulated. *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, H. & W. 50.

³ *Maclay v. Harvey*, 90 Ill. 525, H. & W. 41; *Minnesota Oil Co. v. Collier &c. Co.*, 4 Dillon (U. S. C. C.), 431, H. & W. 46; *Loring v. Boston*, 7 Met. (Mass.) 409; *Wheat v. Cross*, 31 Md. 99.

⁴ *White v. Corlies*, 46 N. Y. 467, H. & W. 7; *Fisher v. Seltzer*, 23 Pa. St. 308, H. & W. 49; *Boston &c. R. v. Bartlett*, 3 Cush. (Mass.) 224; *Houghwout v. Boisauhin*, 18 N. J. Eq. 315.

These two statements are well illustrated by the two following cases: the first by *Offord v. Davies*. Messrs. Davies made a written offer to the plaintiff that if the plaintiff would discount bills for another firm of Davies and Co. they would guarantee the payment of such bills to the extent of £600 during a period of twelve calendar months.

12 C. B.,
N. S. 748.

(a) valid
before ac-
ceptance;

Some bills were discounted by Offord, and duly paid, but before the twelve months had expired Messrs. Davies revoked their offer and announced that they would guarantee no more bills. Offord continued to discount bills, some of which were not paid, and then sued Messrs. Davies on the guarantee. It was held that the revocation was a good defence to the action. The alleged guarantee was an offer, extending over a year, of promises for acts, of guarantees for discounts. Each discount turned the offer into a promise, *pro tanto*, but the entire offer could at any time be revoked except as regarded discounts made before notice of revocation.^a

In the *Great Northern Railway Company v. Witham* we find a transaction of the same character, illustrating the second of the statements above made. The company [*31] advertised for tenders for the supply of such iron articles as they might require between 1st November 1871 and 31st October 1872. Witham offered to supply them on certain terms and his tender was accepted by the company. Orders were given and executed for some time on the terms of the tender, but after a while Witham refused to execute orders. The company sued him for non-performance of an order given and he was held liable.

L. R. 9 C. P.
16.

(b) useless
after ac-
ceptance.

It is important to note the exact relations of the parties.

^a It should be noticed that in the judgment in *Offord v. Davies*, and also to a less extent in the *Great Northern Railway Company v. Witham*, the word 'promise' is used where 'offer of promise' is clearly meant. A revocable promise is unknown to our law. A promise may be void, voidable, or unenforceable from defects in the formation of the contract, or it may be discharged by some subsequent event, but a promise is a binding promise, and is not revocable at the pleasure of the promisor.

The company by advertisement invited all dealers in iron to make offers. The tender of Witham was an offer which might be accepted at any time, or any number of times in the ensuing twelve months. The acceptance of the tender did not make a contract, it was merely an intimation by the company that they regarded Witham's tender as an offer. The company were not bound to order any iron: and Witham might, at any time before an order was given, have revoked his offer by notice to the company: but each order given was an acceptance of Witham's standing offer, and bound him to supply so much iron as the order comprised.¹

An order given after 31st October 1872 would have been an acceptance after the prescribed time, and would have been inoperative.

(c) Offer under seal is irrevocable.

An exception to this general rule as to the revocability of an offer must be made in the case of offers under seal. Such an offer cannot be revoked: even though it is not communicated to the offeree it remains open for his acceptance when he becomes aware of its existence.²

Doe, d.
Garmons v.
Knight, 5
B. & C. 71.

There is no doubt that a grant under seal is binding on the grantor and those who claim under him, though it has never been communicated to the grantee, if it has been duly delivered; and it would seem that an obligation created by deed is on the same footing. The promisor is bound, but the promisee need not take advantage of the

¹ *Accord: Cooper v. Lansing Wheel Co.*, 94 Mich. 272, H. & W. 50, where, however, the court suggests that, "if the offeree orders any portion of the goods, and the offeror has the benefit of the sale, the entire contract may . . . become valid and binding." This can only mean that the offer to supply any orders that may thereafter be given during the specified time becomes irrevocable.

Where *A* agrees to sell to *B* all the goods *B* may want in a certain business, and *B* agrees to buy of *A* all he may want in that business, there is a binding contract and not merely an offer. *Wells v. Alexandre*, 180 N. Y. 642; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427. *Contra: Bailey v. Austrian*, 19 Minn. 535.

² *McMillan v. Ames*, 33 Minn. 257, H. & W. 54.

promise unless he choose: he may repudiate it, and it then lapses.

* If *A* make an obligation to *B* and deliver it to *C* this is [*32] the deed of *A* presently. But if *C* offers it to *B*, then *B* may refuse it *in pais*, and thereby the obligation will lose its force.' Butler & Baker's case, Coke, Rep. iii. 26. b.

The point was much discussed in *Xenos v. Wickham*. L. R. 2 H. L. 296. *A* policy of marine insurance, executed by the insurers and delivered to their clerk to be kept till the shipowner sent for it, was never accepted by the shipowner till he claimed the benefit of it on learning that his ship was lost. The House of Lords took the opinion of the judges, and held that the policy was binding on the insurers.

'It is clear,' said Blackburn, J., in giving his opinion, 'on the authorities as well as on the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, even before he knows of it: though of course if he has not previously assented to the making of the deed the obligee may refuse it.'

The position of the parties in such a case is anomalous. There can be no agreement where there is no mutual assent. The position of the promisor is that of one who has made an offer which he cannot withdraw, or a conditional promise depending for its binding force on the assent of the promisee.¹

It remains to state that revocation, as distinct from lapse, if it is to be operative, must be communicated. In the case of acceptance we have seen that it is communicated and the contract made, if the offeree does by way of acceptance that which the offeror has directly or indirectly indicated as sufficient. The posting of a letter, the doing of an act, may constitute an acceptance and make a contract. The question at once arises, Can revocation be com- (d) Revocation must be communicated.

¹ An action for the breach of the covenant not to revoke the offer would seem to be the proper remedy. But the case is treated as one of irrevocable offer and, upon acceptance, specific performance may be had where that is a suitable remedy. *Hayes v. O'Brien*, 149 Ill. 403; *McMillan v. Ames*, *supra*; *Paddock v. Davenport*, 107 N. C. 710.

municated in the same way, by the posting of a letter of revocation, by the sale of an article offered for purchase?

The answer must be, (subject to the consideration of two cases to which I will presently advert,) that revocation of an offer is not communicated unless *brought to the knowledge* of the offeree. The rule of law on this subject was settled in *Byrne v. Van Tienhoven*. The defendant, writing from Cardiff *on October 1st, made an offer to the plaintiff asking for a reply by cable. The plaintiff received the offer on the 11th, and at once accepted in the manner requested. On the 8th the defendant had posted a letter revoking his offer. [*33]

5 C. P. D.
844.

The questions which Lindley, J., considered to be raised were two. (1) Has a revocation any effect until communicated? (2) Does the posting of a letter of revocation amount to a communication to the person to whom the letter is sent? And he held that an acceptance made by post is not affected by the fact that a letter of revocation is on its way.

‘If the defendant’s contention were to prevail no person who had received an offer by post and had accepted it, would know his position until he had waited such time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principle and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.’

[1892] 2 Ch.
27 C. A.

The case of *Henthorn v. Fraser* extends this rule to the case of a written offer delivered by hand and accepted by post.

But there are two cases which conflict with this rule, and these need examination.

In *Cook v. Oxley* the defendant offered to sell specific goods to the plaintiff on certain terms and to keep the offer open until 4 o’clock that day. Cook averred that he did agree within the time allowed, but that Oxley failed to deliver. The court held that the promise to keep the offer

Cases con-
flicting
with this
rule.
3 T. R. 653.

open till 4 o'clock was not binding for want of consideration, and that —

‘The promise can only be supported on the ground of a new contract made at 4 o'clock; but there is no pretence for that. It has been argued that this must be taken to be a complete sale from the time the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at 4 o'clock to the terms of the sale, *or even that the goods were kept till that time.*’

Per Buller,
J.

It may seem that the court not only regarded Oxley as free to revoke his offer at any time before acceptance, but free to revoke it by a mere sale of the goods without notice.

*But the case was not argued on the true ground. [*34] The declaration sets forth clearly enough an offer turned into a contract by acceptance at 4 P.M. But the argument addressed to the court set up an actual sale of the property if Cook chose to declare himself a buyer before 4 o'clock: so that Oxley was bound to sell if required, but Cook was not bound to buy. The court held that there was no consideration for the alleged promise to keep the goods till 4 P.M. and then sell them to the defendant if he was minded to buy.¹

A more recent case is *Dickinson v. Dodds*, a suit for specific performance of a contract under the following circumstances. On the 10th of June 1874 Dodds gave to Dickinson a memorandum in writing as follows:—‘I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling and out-buildings thereto belonging situated at Croft, belonging to me, for the sum of £800. As witness my hand this 10th day of June, 1874.

£800

(Signed) John Dodds.

¹ “That case [*Cook v. Oxley*] has been supposed to be inaccurately reported; and that in fact there was in that case no acceptance. But, however that may be, if the case has not been directly overruled, it has certainly in later cases been entirely disregarded, and cannot now be considered as of any authority.” Fletcher, J., in *Boston &c. R. v. Bartlett*, 3 Cush. (Mass.), 224, 228.

P.S. This offer to be left over until Friday, 9 o'clock A.M. J. D. (the twelfth) 12th June, 1874.

(Signed) J. Dodds.'

On the 11th of June he sold the property to another person without notice to Dickinson. As a matter of fact Dickinson was informed of the sale, though not by any one authorized to give such information by Dodds. He gave notice, after the sale but before 9 o'clock on the 12th, that he accepted the offer to sell, and sued for specific performance of what he alleged to be a contract.

The Court of Appeal held that there was no contract. James, L.J., after stating that the promise to keep the offer open could not be binding, and that at any moment before a complete acceptance of the offer one party was as free as the other, goes on to say:—

Dickinson
v. Dodds,
2 Ch. D.
468.

'It is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, [*35] "now *I withdraw my offer." I apprehend that there is neither principle nor authority for the proposition that there must be an actual and express withdrawal of the offer, or what is called a retraction. It must to constitute a contract appear that the two minds were one at the same moment of time, that is, that there was an offer continuing up to the moment of acceptance. If there was not such a continuing offer, then the acceptance comes to nothing.'

The language used is wider than was needed to cover the facts of the case: if taken literally it is at variance with the theory of communication of acceptance and revocation as settled by the cases which I have discussed. In business there must be many offers which do not contemplate an immediate answer: a reasonable time is here allowed during which the offer is continuing, and a mere mental revocation would not avail against an acceptance made within a reasonable or a prescribed time.

But putting aside this point, on which *Dickinson v. Dodds* can no longer be considered an authority, the case presents two points of difficulty.

M offers to sell a specific thing to *A*, and while his offer

is yet open for acceptance, he actually sells it to *X*. *A* accepts within a reasonable or prescribed time.

Clearly *M* cannot sell the same thing to two different persons, and clearly also he is under liability to two persons. *A* may not be able to enforce the performance of the contract, but he is at any rate entitled to damages for its breach.¹

But the matter is complicated in *Dickinson v. Dodds* by the fact that the plaintiff, when he communicated his acceptance, had been informed by a third party that the property was sold to another, and the court thereon held that there was no contract.

It is easy to understand that if the acceptor knew for a fact, though his informant had no authority from the offeror, that the offer was revoked, his acceptance would not entitle him to specific performance of the contract, and might greatly reduce the amount recoverable in an action for damages.

But can we hold that knowledge of the offeror's intention *to revoke, from whatever source it reaches [*36] the offeree, is good notice of revocation? This is the view taken by Sir F. Pollock. But if it is correct, the inconvenience might be grave. Suppose a merchant to receive an offer of a consignment of goods from a distant correspondent, with liberty to reserve his answer for some days. Meantime an unauthorized person tells him that the offeror has sold or promised the goods to another. What is he to do? His informant may be right, and then

Contract,
ed. 5. p. 29.

¹ It is now generally held that the sale of the thing offered is not of itself a revocation of the offer, and in this respect there would seem to be no difference between the case where the parties are negotiating by personal communication and where they are negotiating by post or telegraph. A revocation of which the offeree remains in ignorance is of no effect. *Wheat v. Cross*, 31 Md. 99; *Kempner v. Cohn*, 47 Ark. 519. An exception exists in the case of offers of rewards by advertisement. Such offers may be revoked by advertisement and the revocation is effective whether brought to the notice of the acceptor or not. *Shuey v. United States*, 92 U. S. 73.

if he accepts Sir F. Pollock would hold his acceptance worthless. Or his informant may be a gossip or mischief-maker, and if on such authority he refrains from accepting he may lose a good bargain.

Such is the real and only difficulty created by *Dickinson v. Dodds*. It is no authority, now, for the validity of an uncommunicated revocation: but it does raise a question, as yet unanswered by judicial decision, as to the source whence notice of revocation must come.¹

§ 7. *An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.*

The proposition is best understood by an illustration.

(7) An offer may be made to all the world.

A contract cannot arise from it till it is accepted by one.

The offer, by way of advertisement, of a reward for the rendering of certain services, addressed to the public at large, becomes a contract to pay the reward so soon as an individual renders the services, but not before.

To hold that any contractual obligation exists before the services are rendered, would amount to saying that a man may be bound by contract to an indefinite and unascertained body of persons, or, as it has been expressed, that a man may have a contract with the whole world. This would be contrary to the notions both of agreement and obligation, which we have ascertained to co-exist in contract. Agreement is the expression of a common intention, and there can be none while intention is expressed on one side only; nor can we say that obligation, in the sense of a *vinculum juris*, *exists between a definite offeror and the indefinite mass of persons to whom it [*37] is open to accept his proposal. But this view has never

¹ *Coleman v. Applegarth*, 68 Md. 21, H. & W. 57, follows *Dickinson v. Dodds* in holding that it is enough that the offeree knows of the revocation of the offer.

been seriously entertained in English law;^a the promise is regarded as being made, not to the many who *might* accept the offer, but to the person or persons by whom it is accepted.

The difficulties which have arisen out of offers thus made are of a more practical character. Difficulties.

Information may be collected and contributed by various persons. Which of these has accepted the offer? Who is entitled?

In *Lancaster v. Walsh* it was held that he who gave the earliest information was entitled to the reward.¹ 4 M. & W. 16.

Where a constable has given information for which reward has been offered, it may be asked whether he has done more than in the ordinary course of duty he is bound to do. It would seem from the case of *England v. Davidson*, where a policeman not only gave information but collected evidence, and was thereupon held entitled to the reward, that unless a police constable does something more than the ordinary course of duty would require, he cannot claim a reward.² What is acceptance?
11 A. & E. 856.

But the most serious difficulties which have arisen are of two sorts.

1. Is knowledge of the existence of an offer essential to its acceptance, or can it be accepted by an accidental compliance with its terms? (i) Is knowledge of offer essential?

Williams v. Carwardine is authority for saying that the motive of compliance is immaterial; it is not authority for saying that knowledge of the offer is immaterial. 4 B. & Ad. 621.

^a The view of Savigny that an offer of this sort creates an obligation from the outset, but that acceptance by performance of the condition can do no more than result in a debt of honour, seems to the English lawyer neither logical nor equitable. Sav. Obl. 2 sect. 61.

¹ *United States v. Simons*, 7 Fed. Rep. 709. For cases of joint informers see *Janvrin v. Exeter*, 48 N. H. 83; *Fargo v. Arthur*, 43 How. Pr. (N. Y.) 193.

² *Smith v. Whildin*, 10 Pa. St. 39, H. & W. 176; *Ring v. Devlin*, 68 Wis. 384. But if the act is extra-official the reward may be recovered. *McCandless v. Allegheny Bessemer Steel Co.*, 152 Pa. St. 139; *Harris v. More*, 70 Cal. 502.

88 N. Y. 248.
ante, p. 16.
[H. & W.
62.]

In the American case, *Fitch v. Snedaker*, to which I referred above, it is laid down with clear and convincing argument that knowledge of the offer is essential.¹

64 L. T. 594.

Gibbons v. Proctor, for reasons which I have already stated, *cannot be accepted as authority for the rule, [*38] which it would appear to lay down, that knowledge of the offer is immaterial, and that if the offeror gets what he wants he must pay for it, even though the information wanted was supplied in ignorance that a reward was offered.

(ii) Distinction between offer and invitation to treat.

2. It is often difficult to distinguish statements of intention which can result in no obligation *ex contractu* from offers which admit of acceptance, and so become binding promises. Such statements may relate to the whole transaction or only to a subordinate part of the transaction. A man announces that he will sell goods by tender or by auction, or that he is prepared to pay money under certain conditions: or again, a railway company offers to carry passengers from A to X and to reach X and the intermediate stations at certain times. In such cases it may be asked whether the statement made is an offer capable of acceptance or merely an invitation to make offers, and do business; whether the railway company by its published time-table makes offers which form terms in the contract to carry, or whether it states probabilities in order to induce passengers to take tickets.

We may note the distinction in the following cases.

Thatcher v.
England, 8
C. B. 254.

An offer of reward to be paid 'on recovery of the property and conviction of the offender' was held to be too indeterminate to be capable of acceptance by a specific person.²

An announcement that goods would be sold by tender, unaccompanied by words indicating that they would be

¹ But there is strong American authority to the contrary. *Dawkins v. Sappington*, 26 Ind. 199, H. & W. 65. Ante, p. 19.

² But see *Wilmoth v. Hensel*, 151 Pa. St. 200.

sold to the highest bidder, was held to be 'a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.'

Spencer v.
Harding,
L. R. 5 C. P.
561.

An advertisement by an auctioneer, that a sale of certain articles would take place on a certain day, was held not to bind the auctioneer to sell the goods, nor to make him liable upon a contract to indemnify persons who were put to expense in order to attend the sale.

Harris v.
Nickerson,
L. R. 8 Q. B.
286.

'Unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases *after [*39] advertising a sale the auctioneer must give notice of any articles that are withdrawn, we cannot hold the defendant liable.'

On the other hand we find in the following cases a contract made by acceptance of a general offer, such acceptance being signified by performance of its terms.

In *Warlow v. Harrison* the advertisement of a sale *without reserve* was held to create a binding contract between the auctioneer and the highest bidder that the goods should be sold to the latter. The law was stated thus by Martin, B.:—

1 E. & E. 295.

'The sale was announced by them (the auctioneers) to be "without reserve." This, according to all the cases both at law and in equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not.'

'We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward, or that of a railway company publishing a time-table stating the times when, and the places to which, the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him. Upon the same principle, it seems to us that the highest *bona fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve.'

Thornett v.
Haines,
15 M. & W.
367.

Denton v.
G. N. Rail-
way Co.,
5 E. & B. 860.

Warlow v.
Harrison,
1 E. & E. 316.

In the recent 'Smoke Ball' case the Carbolic Smoke Ball Company offered by advertisement to pay £100 to any one 'who contracts the increasing epidemic influenza colds, or any disease caused by taking cold, after having used the

[1892] 2 Q.
B. 484.
[1893] 1 Q.
B. 268.

ball three times daily for two weeks, according to the printed directions.' It was added that £1,000 was deposited with the Alliance Bank 'showing our sincerity in the matter.'

Mrs. Carlill used the smoke ball as required by the directions; she afterwards suffered from influenza and sued the company for the promised reward. The company was held liable. It was urged that a notification of acceptance should have been made to the company. The court held that this was one of the class of cases in which, as in the case of reward offered for information or for the recovery *of lost property, there need be no acceptance of the offer other than the performance of the condition. [*40]

[1893] 1 Q.
B. C. A. 268.

It was further argued that the alleged offer was an advertisement or puff which no reasonable person would take to be serious. But the statement that £1,000 had been deposited to meet demands, was regarded as evidence that the offer was sincere.¹

Similarly statements made in the time-tables of a railway company must be regarded as something more than a mere inducement to travellers. They have been held to be promises made to each person who accepts the standing offer of the company to carry him for hire. The passenger then becomes entitled to the use of reasonable diligence on the part of the company that its promises as to the hours of arrival and departure shall be performed.²

Le Blanche
v. L. & N. W.
Railway Co.,
1 C. P. D.
286.

In all these cases the same question presents itself under various forms. Is there an offer?^a And to constitute an offer the words used, however general, must be capable of

^a A bookseller's catalogue, with prices stated against the names of the books, would seem to contain a number of offers. Put if the bookseller receives by the same post five or six letters asking for a particular book at the price named, to whom is he bound? To the man who first posted his letter of acceptance? How is this to be ascertained? The catalogue is clearly an invitation to do business, and not an offer.

¹ See *Bull v. Talcot*, 2 Root (Conn.), 119; *Tarbell v. Stevens*, 7 Ia. 163.

² *Sears v. Eastern R.*, 14 Allen (Mass.), 433; *Gordon v. Manchester &c. Ry.*, 52 N. H. 596; *Heirn v. McCaughan*, 32 Miss. 1.

application to specific persons, and must be distinguishable from invitations to transact business, and from advertisement or puffery which does not contemplate legal relations.¹

§ 8. *The offer must be intended to create, and capable of creating legal relations.*

In order that an offer may be made binding by acceptance, it must be made in contemplation of legal consequences; a mere statement of intention made in the course of conversation will not constitute a binding promise, though it be acted upon by the party to whom it was made. Thus in the case of *Week v. Tibold*, the defendant told the plaintiff that he would give £100 to him who married his daughter with his consent. Plaintiff married defendant's daughter with his *consent, and afterwards claimed [*41] the fulfilment of the promise and brought an action upon it. It was held not to be reasonable that a man 'should be bound by general words spoken to excite suitors.'

(8) Offer must be intended to create legal relations,

Roll. Abr. p. 6.

On a like footing stand engagements of pleasure, or agreements which from their nature do not admit of being regarded as business transactions. We cannot in all cases decline to regard such engagements as contracts on the ground that they are not reducible to a money value. The acceptance of an invitation to dinner or to play in a cricket match forms an agreement in which the parties may incur expense in the fulfilment of their mutual promises. The damages resulting from breach might be ascertainable, but the courts would probably hold that, as no legal consequences were contemplated by the parties, no action would lie.

And an offer must be capable of affecting legal rela-

¹ See, for distinction between offers and invitations to treat, *Moulton v. Kershaw*, 59 Wis. 316, H. & W. 67; *Ahearn v. Ayres*, 38 Mich. 692; *Ashcroft v. Butterworth*, 136 Mass. 511; *Walsh v. St. Louis Exposition*, 16 Mo. App. 502, affirmed 90 Mo. 459.

and capable of creating them.

Guthing v. Lynn, 2 B. & Ad. 282.

Taylor v. Brewer, 1 M. & S. 290.

Davies v. Davies, 36 Ch. D. 359.

tions. The parties must make their own contract; the courts will not construct one for them out of terms which are indefinite or illusory. *A* bought a horse from *X* and promised that 'if the horse was lucky to him he would give £5 more or the buying of another horse': it was held that such a promise was too loose and vague to be considered in a court of law.

A agreed with *X* to do certain services *for such remuneration as should be deemed right*: it was held that there was no promise that *A* should receive anything, nor any engagement capable of enforcement.

A covenanted with *X* to retire wholly from the practice of a trade 'so far as the law allows': it was held that the parties must fix the limit of their covenant and not leave their agreement to be framed for them by the court.¹

§ 9. *Acceptance must be absolute, and identical with the terms of the offer.*

(9) Acceptance must be absolute,

Unless this is so the intention expressed by one of the parties is either doubtful in itself or different from that of the other. If *A* offers to *X* to do a definite thing and *X* *accepts conditionally, or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat, or it is in effect a counter proposal. [*42]

Acceptance therefore must be absolute.

Honeyman v. Marryat, 6 H. L. C. 112.

A proposed to sell a property to *X*; *X* accepted 'subject to the terms of a contract being arranged' between his solicitor and *A*'s. Here it was held that there was no agreement, for the acceptance was not final but subject

¹ Words spoken in jest do not constitute a contract. *Keller v. Holderman*, 11 Mich. 248, H. & W. 71; *McClurg v. Terry*, 21 N. J. Eq. 225, H. & W. 72. Nor do promises too indefinite for enforcement by the court. *Sherman v. Kitsmiller*, 17 S. & R. (Pa.) 45; H. & W. 157. Cf. *Long v. Battle Creek*, 39 Mich. 323. An agreement to pay "good wages" is too indefinite. *Fairplay School Township v. O'Neal*, 127 Ind. 95.

to a discussion to take place between the agents of the parties.

A made an offer of £1,450 for a property belonging to *X*. *X* accepted the offer, and sent a contract to *A* for signature. The contract contained, among other terms, a requirement that the purchaser should pay a deposit of £10 *per cent.*, and should complete the purchase on a certain day, and a condition as to the title to the property. *A* declined to carry out the transaction, and it was held that the acceptance introduced terms which were no part of the offer, and so did not conclude the contract.¹

Jones v. Daniel, 1894, 2 Ch. 332.

Acceptance must also be identical in terms with the offer.

Hyde v. Wrench, 3 Beav. 334.

A proposed to sell a farm to *X* for £1,000, *X* said he would give £950. *A* refused this offer, and then *X* said that he was willing to give £1,000. *A* declined to adhere to his original proposal, and *X* endeavoured to obtain specific performance of the alleged contract. But his offer to buy at £950 in answer to *A*'s offer to sell at £1,000 was held to be a refusal of *A*'s offer, and a counter proposal. He could not fall back on the original offer.²

and identical with the terms of the proposal.

Difficulties may arise on both these points where a contract is made out of a correspondence involving long negotiations. Where such correspondence appears to result in a definite offer and acceptance it is always necessary to inquire whether this offer and acceptance include all the terms in negotiation. Where the parties have come to terms, a subsequent revival of negotiations may amount to a rescission on one side, but does not alter the fact that a contract has been made.

Hussey v. Horne Payne, 4 App. Ca. 311.

Bellamy v. Debenham, 45 Ch. D. 481.

¹ *Baker v. Holt*, 56 Wis. 100; *Fenno v. Weston*, 31 Vt. 345.

² *Minneapolis &c. Ry. v. Columbus Rolling Mill*, 119 U. S. 149, H. & W. 74; *Weaver v. Burr*, 31 W. Va. 736.

CHAPTER II.

Form and Consideration.

Necessity
for one of
these
marks
in English
law.

OFFER and acceptance bring the parties together, and constitute the outward semblance of contract; but most systems of law require some further evidence of the intention of the parties, and in default of such evidence refuse to recognize an obligation. In English law this evidence is supplied by form and consideration: sometimes one, sometimes the other, sometimes both are required to be present in a contract to make it enforceable. By form we mean some peculiar solemnity attaching to the expression of agreement which of itself gives efficacy to the contract; by consideration we mean some gain to the party making the promise, arising from the act or forbearance, given or promised, of the promisee.

History
of the
matter.

Alike in English and Roman law, form, during the infancy of the system, is the most important ingredient in contract. The courts look to the formalities of a transaction as supplying the most obvious and conclusive evidence of the intention of the parties; the notion of consideration, if not unknown, is at any rate imperfectly developed. This is no place for an antiquarian discussion, however interesting, but we may say that English law starts, as Roman law probably started, with two distinct conceptions of contract. One, that any promise is binding if expressed in form of a certain kind: the other, that the acceptance of benefits of a certain kind implies an enforceable promise to repay them. The theory *that the Roman contracts developed out of conveyance in an order of [*44] moral progression seems to rest on no sure evidence; and there is reason to believe that the earliest of them were

Common
features in
history of
Roman
and Eng-
lish law.

those with which we are familiar as the contracts *verbis* and *re*. The solemnities of a promise by formal question and answer bound the promisor to fulfil an intention thus expressed, and the readjustment of proprietary right where money or goods had been lent for consumption or use, led to the enforcement of the engagements known as *mutuum* and *commodatum*. In English law we find that before the end of the thirteenth century two analogous contracts were enforceable: one formal, the contract under seal; one informal, arising from sale and delivery of goods, or loan of money, in which consideration had passed on one side, and an implied or express promise to repay would support an action of debt. Beyond this, the idea of enforcing an informal promise, simply because a benefit was accruing or was about to accrue to the promisor by the act or forbearance of the promisee, does not appear to have been entertained before the middle or end of the fifteenth century.

The formal contract of English law is the *contract under seal*. Only by the use of this form could an executory contract be made binding, until the doctrine of consideration began to prevail. We have to bear in mind that it is to the form only that the courts look in upholding this contract; the *consensus* of the parties has not emerged from the ceremonies which surround its expression. Courts of law will not trouble themselves with the intentions of parties who have not couched their agreement in the solemn form to which the law attaches legal consequences. Nor, on the other hand, where form is present will they demand or admit further evidence as to intention.

The formal contract in English law.

It is probably due to the influence of the court of chancery, that later on the common law courts begin to take account of the intention of the parties. The idea of the importance of form thenceforth undergoes a curious change. [*45] *When a contract comes before the courts, evidence is required that it expresses the genuine intention of the parties; and this evidence is found either

in the solemnities of the contract under seal, or in the presence of consideration, that is to say, in some benefit to the promisor or loss to the promisee, granted or incurred by the latter in return for the promise of the former. Gradually consideration comes to be regarded as the important ingredient in contract, and then the solemnity of a deed is said to make a contract binding because it 'imports consideration,' though in truth it is the form which, apart from any question of consideration, carries with it legal consequences.

But we must return to the informal promise.

The informal promise.

I have said that the only contracts which English law originally recognized, were the formal contract under seal, and the informal contract in which consideration was executed upon one side. How then do we arrive at the modern breadth of doctrine that any promise based upon consideration is binding upon the promisor? This question resolves itself into two others. How did informal executory contracts become actionable at all? How did consideration become the universal test of their actionability?

Remedies for breach of promise in Bracton.

To answer the first question we must look to the remedies which, in the early history of our law, were open to persons complaining of the breach of a promise, express or implied. The only actions of this nature, during the thirteenth and fourteenth centuries, were the actions of covenant, of debt, and of detinue. Covenant lay for breach of promises made under seal: debt for liquidated or ascertained claims, arising either from breach of covenant, or from non-payment of a sum certain, due for goods supplied, work done, or money lent: detinue^a lay for the recovery of specific chattels *kept back by the defendant from the plaintiff. These were the only remedies [*46] based upon contract. An executory agreement therefore, unless made under seal, was remediless.

Bryant v. Herbert,
3 C. P. D.
389.

^a The Court of Appeal has decided that the action of detinue is founded in *tort*. But though the wrongful detention of goods is the cause of action, the remedy may apply to cases in which the possession of the goods originated in the contract of bailment. [See judgment of Brett, L.J., at p. 392.]

The remedy by which such promises were eventually enforced is a curious instance of the shifts and turns by which practical convenience evades technical rules. The breach of an executory contract, until quite recent times, gave rise to a form of the action of trespass on the case.

This was a development of the action of trespass: trespass lay for injuries resulting from immediate violence: trespass on the case lay for the consequences of a wrongful act, and proved a remedy of a very extensive and flexible character.

This action came to be applied to contract in the following way. It lay originally for a malfeasance, or the doing an act which was wrongful *ab initio*: it next was applied to a misfeasance, or improper conduct in doing what it was not otherwise wrongful to do, and in this form it applied to promises part-performed and then abandoned or negligently executed to the detriment of the promisee: finally, and not without some resistance on the part of the courts, it came to be applied to a non-feasance, or neglect to do what one was bound to do. In this form it adapted itself to executory contracts. The first reported attempt so to apply it was in the reign of Henry IV, when a carpenter was sued for a non-feasance because he had undertaken, *quare assumpsisset*, to build a house and had made default. The judges in that case held that the action, if any, must be in covenant, and it did not appear that the promise was under seal. But in course of time the desire of the common law courts to extend their jurisdiction, and their fear lest the chancery by means of the doctrine of consideration, which it had always applied to the transfer of interests in land, might enlarge its jurisdiction over contract, produced a change of view. Early in the sixteenth century it was settled that the form of trespass on the case known henceforth as the action of assumpsit

Spence,
Chancery
Jurisdiction.
i. 241.

Origin of
action of
assumpsit.
[2 Harv. L.
Rev. 1, 58.
J. B. Ames.]

Reeves, ed.
Finlason,
ii. 395, 396.

Pollock, 141,
ed. 5.

Reasons
for its ex-
tension.

would *lie for the non-feasance, or non-performance [*47] of an executory contract; and the form of writ by which this action was commenced, perpetuated this peculiar

aspect of a breach of a promise until recent enactments for the simplification of procedure.

It is not improbable that the very difficulty of obtaining a remedy for breach of an executory contract led in the end to the breadth and simplicity of the law as it now stands. If the special actions *ex contractu* had been developed so as to give legal force to informal promises, they might have been applied only to promises of a particular sort: a class of contracts similar to the consensual contracts of Roman law, privileged to be informal, would then have been protected by the courts, as exceptions to the rule that form or executed consideration was needed to support a promise.

But the conception that the breach of a promise was something akin to a wrong—the fact that it could be remedied only by a form of action which was originally applicable to wrongs—had a somewhat peculiar result. The cause of action was the non-performance of an undertaking; not the breach of a particular kind of contract; it was therefore of universal application. Thus all promises would become binding, and English law avoided the technicalities which must needs arise from a classification of contracts. Where all promises may be actionable it follows that there must be some universal test of actionability, and this test was supplied by the doctrine of consideration.

Origin of
considera-
tion as a
test of ac-
tiona-
bility is
uncertain.

It is a hard matter to say how consideration came to form the basis upon which the validity of informal promises might rest. Probably the '*quid pro quo*' which furnished the ground of the action of debt, and the detriment to the promisee on which was based the delictual action of assumpsit, were both merged in the more general conception of consideration as it was developed in the chancery.

For the chancellor was wont to inquire into the intentions of the parties beyond the form, or even in the absence of the form in which, by the rules of common law, that intention should be displayed, and he would [*48]

find evidence of the meaning of men in the practical results to them of their acts or promises. It was thus that the covenant to stand seised and the bargain and sale of lands were enforced in the chancery before the Statute of Uses; and the doctrine once applied to simple contract was found to be of great practical convenience. When a promise came before the courts they asked no more than this, 'was the party making the promise to gain anything from the promisee, or was the promisee to sustain any detriment in return for the promise?' if so, there was a '*quid pro quo*' for the promise, and an action might be maintained for the breach of it.^a

So silent was the development of the doctrine as to the universal need of consideration for contracts not under seal, and so marked was the absence of any express authority for the rule in its broad and simple application, that Lord Mansfield in 1765 raised the question whether, in the case of commercial contracts made in writing, there was any necessity for consideration to support the promise. In the case of *Pillans v. Van Mierop* he held that consideration was only required as evidence of intention, and that where such evidence was effectually supplied in any other way, the want of consideration would not effect the validity of a parol promise. This doctrine was emphatically disclaimed in the opinion of the judges delivered not long afterwards in the House of Lords, in *Rann v. Hughes*. The logical completeness of our law of contract as it stands at present is apt to make us think that its rules are inevitable and must have existed from all time. To such an impression the views set forth by Lord Mansfield in 1765 are a useful corrective.¹

Gradual
growth of
doctrine.

3 Burr. 1663

7 T.R. 350.

^a In the foregoing historical sketch I have refrained from citing authorities. To do so would encumber with detail a part of my book in which brevity is essential to the general plan. I may now refer the student to the chapter on Contract in the History of English Law, by Pollock and Maitland, vol. ii. pp. 183-230, a storehouse of learning upon the subject.

¹ See *Cook v. Bradley*, 7 Conn. 57, H. & W. 133.

*CLASSIFICATION OF CONTRACTS. [49]

Contracts
are
formal,
or simple.

There is but one formal contract in English law, the deed or contract under seal; all others are simple contracts depending for their validity upon the presence of consideration. The legislature has, however, imposed upon some of these simple contracts the necessity of some kind of form, and these stand in an intermediate position between the *deed* to which its form alone gives legal force, and the *simple contract* which rests upon consideration and is free from the imposition of any statutory form. In addition to these a certain class of obligation has been imported into the law of contract under the title of contracts of record, and though these obligations are wanting in the principal features of contract, it is necessary, in deference to established authority, to treat of them here.

The contracts known to English law may then be divided thus:—

Classifica-
tion of
contracts.

- | | | |
|---|---|---|
| <p>A. <i>Formal.</i>
<i>i.e.</i> dependent for
their validity
upon their form.</p> | } | <p>1. Contracts of record.
2. Contract under seal.</p> |
| <p>B. <i>Simple.</i>
<i>i.e.</i> dependent for
their validity
upon the pres-
ence of con-
sideration.</p> | } | <p>3. Contracts required by
law to be in some
form other than un-
der seal.
4. Contracts for which no
form is required.</p> |

It will be best to deal first with the essentially formal contracts, then with those forms which are superimposed upon simple contracts, and then with consideration, the requisite common to all simple contracts.

[*50]

*FORMAL CONTRACT.

§ 1. *Contracts of record.*

The obligations which are styled contracts of record are judgment, recognizance, statutes merchant and staple, and recognizances in the nature of statute staple. (1) Contracts of record.

And first as to judgment. The proceedings of courts of record are entered upon parchment rolls, and upon these an entry is made of the judgment in an action, when that judgment is final. A judgment awarding a sum of money to one of two litigants, either by way of damages or for costs, lays an obligation upon the other to pay the sum awarded. Such an obligation may be the final result of a lawsuit when the court pronounces judgment; or the parties may agree to enter judgment in favour of one of them. This may be done before litigation has commenced or while it is pending; and it is done by a contract of a formal character. A *warrant of attorney* may give authority from one party to the other to enter judgment upon terms settled; a *cognovit actionem* is an acknowledgment by one party of the right of the other in respect of a pending dispute and confers a similar authority.¹ (1) Judgment. How it originates. Leake, Contracts, ed. 3, 133.

The characteristics of an obligation of this nature may be shortly stated as follows:— Its characteristics.

1. Its terms admit of no dispute, but are conclusively proved by production of the record.²

2. So soon as it is created the previously existing rights with which it deals merge, or are extinguished in it: for

¹ A judgment is not a contract, *Morley v. Lake Shore Ry.*, 146 U. S. 162; *O'Brien v. Young*, 95 N. Y. 428, H. & W. 76; though it may be construed as falling within the term "implied contract" as used in a statute, *Gutta Percha &c. Co. v. Mayor*, 108 N. Y. 276; or simply "contract" where the statute makes but two classes of actions, namely, tort and contract, *Moore v. Nowell*, 94 N. C. 265.

² *Littleton v. Richardson*, 34 N. H. 179; *Williams v. McGrade*, 13 Minn. 46.

instance, *A* sues *X* for breach of contract or for civil injury: judgment is entered in favour of *A* either by consent or after trial: *A* has no further rights in respect of his cause of action, he only becomes creditor of *X* for the sum awarded.¹

3. Such a creditor has certain advantages which an ordinary creditor does not possess. He has a double remedy for his debt; he can have execution upon the judgment and so obtain directly the sum awarded from the personal property of the debtor; he can also bring an action for the non-fulfilment of the obligation. For this purpose the judgment not only of a court of record,^a but of any court of competent jurisdiction, British or foreign, other than a county court,^b is treated as creating an obligation upon which an action may be brought for money due.²

Williams v.
Jones, 18
M. & W. 628.

Before 27 and 28 Vict. c. 112 he had, during the lifetime of the judgment debtor, a charge upon his lands; but since the passing of that statute lands are not affected by

Stephen,
Comm. iii.
272.

^a The essential features of a court of record are (1) that its 'acts and judicial proceedings are enrolled for a perpetual testimony,' (2) that it can fine or imprison for contempt.

^b 51 & 52 Vict. c. 43. § 63. If action could be brought in a superior court on a county court judgment the cheap remedy which county courts are intended to give would become expensive. *Berkeley v. Elderkin*, 1 E. & B. 805.

¹ Judgments *in personam* merge all rights under the cause of action litigated as between the parties. *Miller v. Covert*, 1 Wend. (N. Y.) 487, H. & W. 631; *Ries v. Rowland*, 11 Fed. Rep. 657. But it must be the same cause of action. *Vanuxem v. Burr*, 151 Mass. 386, H. & W. 632. This does not apply to foreign judgments. *Eastern Township Bank v. Beebe*, 53 Vt. 177; *Wood v. Gamble*, 11 Cush. (Mass.) 8. But it does apply to judgments of a sister State of the United States under art. 4, § 1, of the Federal constitution, and the acts of Congress thereunder (U. S. Rev. St. § 905). *Mills v. Duryee*, 7 Cranch (U. S.), 481; *Hampton v. McConnel*, 3 Wheat. (U. S.) 234. Judgments *in rem* are conclusive as to all parties interested. *The Rio Grande*, 23 Wall. (U. S.) 458.

² The double remedy of the execution and action on the judgment may be pursued simultaneously. *Moor v. Towle*, 38 Me. 133; *Cushing v. Arnold*, 9 Met. (Mass.) 23.

a judgment until they have been formally taken into execution.¹

Recognizances are aptly described as 'contracts made with the crown in its judicial capacity.' A recognizance is a writing acknowledged by the party to it before a judge or officer having authority for the purpose, and enrolled in a court of record. It may be a promise, with penalties for the breach of it, to keep the peace, or to appear at the assizes.²

(2) Recognizance.
Pollock,
6, 141.

Statutes merchant and staple, and recognizances in the nature of a statute staple, have long become obsolete. They were once important, because they were acknowledgments of debt which, when duly made, created a charge upon the lands of the debtor.

(3) Statutes merchant and staple.

There is little of the true nature of a contract in the so-called contracts of record. *Judgments* are obligations dependent for their binding force, not on the consent of the parties, but upon their direct promulgation by the sovereign authority acting in its judicial capacity. *Recognizances* are promises made to the sovereign with whom, both by the technical rules of English law and upon the theories of jurisprudence, the subject cannot contract. Statutes merchant and staple share the characteristics of judgments. We need consider these obligations no further.

[*52]

*§ 2. *Contract under seal.*

The only true formal contract of English law is the *contract under seal*, sometimes also called a deed and sometimes a specialty. It is the only true *formal contract* because it derives its validity neither from the fact of

(2) Contract under seal.

¹ In most of the States a judgment duly docketed is a lien on the debtor's real estate within the county where so docketed. Freeman on Judgments, § 339; Black on Judgments, § 398; Hutcheson v. Grubbs, 80 Va. 251. Judgments in the Federal courts follow the law of the State where rendered. Act of Aug. 1888, 25 St. at L. 357, 1 Supp. Rev. St. U. S. 602.

² See *Smith v. Collins*, 42 Kans. 259.

agreement, nor from the consideration which may exist for the promise of either party, but from the peculiar *form* in which it is expressed. Let us then consider (1) how the contract under seal is made; (2) in what respects it differs from simple contracts; (3) under what circumstances it is necessary to contract under seal.

(i) **Formation.**

(1) *How a contract under seal is made.*

A deed must be in writing or printed, on paper or parchment. It is often said to be executed, or made conclusive as between the parties, by being 'signed, sealed, and delivered.' Of these three things there is some doubt as to the necessity of a signature, though no one, unless ambitious of giving his name to a leading case, would omit to sign a deed. But that which identifies a party to a deed with the execution of it is the presence of his *seal*; ¹ that which makes the deed operative, so far as he is concerned, is the fact of its *delivery* by him. Delivery is effected either by actually handing the deed to the other party to it, or to a stranger for his benefit, or by words indicating an intention that the deed should become operative though it is retained in the possession of the party executing.² In the execution of a deed seals are commonly affixed beforehand, and the party executing the deed signs his name, places his finger on the seal intended for him,

Sheppard,
Touchstone,
53.

Signed.

Coch v.
Goodman,
2 Q. B. 597.

Sealed.

Delivered.

Xenos v.
Wickham,
L. R. 2 H. L.
296.

¹ "The requisite of a seal at common law was that it be impressed upon wax, wafer, or other tenacious substances. . . . Whatever may have been the practice in other States, the rule of the common law in that respect has been substantially adhered to in this State, except so far as modified by statute." *Solon v. Williamsburgh Sav. Bk.*, 114 N. Y. 122, 132. For relaxations of this strict rule, see *Pierce v. Indseth*, 106 U. S. 546; *Hacker's Appeal*, 121 Pa. St. 192; *Cromwell v. Tate's Ex'r*, 7 Leigh (Va.), 301. For statutory modifications see *Stimson's Am. St. Law*, §§ 1564-5. In some States all private seals are abolished. *Ib.*

² *Gorham's Adm'r v. Meacham's Adm'r*, 63 Vt. 231, H. & W. 88. "Delivery may be effected by words without acts, or by acts without words, or by both acts and words." *Ruckman v. Ruckman*, 32 N. J. Eq. 259, 261; *Jordan v. Davis*, 108 Ill. 336.

and utters the words 'I deliver this as my act and deed.' Thus he at once identifies himself with the seal, and indicates his intention to *deliver*, that is, to give operation to the deed.

A deed may be delivered subject to a condition; it then Escrow.

*does not take effect until the condition is per-
 [*53] formed: during this period it is termed an *escrow*, but immediately upon the fulfilment of the condition it becomes operative and acquires the character of a deed. There is an old rule that a deed, thus conditionally delivered, must not be delivered to one who is a party to it, else it takes effect at once, on the ground that a delivery in fact outweighs verbal conditions. But the modern cases appear to show that the intention of the parties prevails if they clearly meant the deed to be delivered conditionally.¹

Sheppard,
Touchstone,
59.

Hudson v.
Revett,
5 Bing. at
p. 387.

The distinction between a *deed poll* and an *indenture* is no longer important since 8 & 9 Vict. c. 106. s. 5. Formerly a deed made by one party had a polled or smooth-cut edge, a deed made between two or more parties was copied for each on the same parchment, and the copies cut apart with indented edges, so as to enable them to be identified by fitting the parts together. Such deeds were called indentures. An indented edge is not now necessary to give the effect of an indenture to a deed purporting to be such.

Indenture
and deed
poll.

(2) *Characteristics of contract under seal.*

(a) Estoppel is a rule of evidence whereby a man is not allowed to disprove facts in the truth of which he has by words or conduct induced others to believe, knowing that they might or would act on such belief. The recitals and other statements in a deed, if express and clear, are

(ii) **Char-
acteris-
tics.**

(a) **Estop-
pel.**

¹ *Prutsman v. Baker*, 30 Wis. 644. Delivery to the grantee cannot be an escrow in the United States generally. *Worrall v. Munn*, 5 N. Y. 229; *Richmond v. Morford*, 4 Wash. 337; *Hubbard v. Greeley*, 84 Me. 340.

Taunton, J.,
in *Bowman*
v. *Taylor*,
2 A. & E.
278.

conclusive against the parties to it in any litigation arising upon the deed."¹ 'Where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted.'¹

(b) Merger.

(b) Where two parties have made a simple contract for any purpose, and afterwards have entered into an identical engagement by deed, the simple contract is *merged* in the *deed and becomes extinct. This extinction of a lesser in a higher security, like the extinction of a [54] lesser in a greater interest in lands, is called *merger*.²

(c) Limitation of actions.

(c) A right* of action arising out of simple contract is barred if not exercised within six years.

A right of action arising out of a contract under seal is barred if not exercised within twenty years.³

See Part V.
ch. iii. § 4.

These general statements must be taken with some qualifications to be discussed hereafter.

(d) Remedies against debtor's estate.

(d) Remedies have been and are possessed by the creditor by deed against the estate of the debtor, which are not possessed by the creditor of a simple contract debt, and which mark the importance attached to the formal contract.

In administering the *personal* estate of a testator or intestate person, creditors by specialty were entitled to a priority over creditors by simple contract. Their privilege in this respect is taken away by 32 & 33 Vict. c. 46.

As regards the *real* estate of a debtor, the creditor by specialty had an advantage. If the debtor bound himself

[1898] 1 Ch.
1.

^a The limitations of this rule have been discussed in recent cases, of which the most recent is *The Onward Building Society v. Smithson*. For estoppel *in pais*, that is by conduct, words, or writing not under seal, see *p. 164.

¹ *Metropolitan Life Ins. Co. v. Bender*, 124 N. Y. 47. Only the parties to a sealed instrument can sue or be sued upon it. *Briggs v. Partridge*, 64 N. Y. 357.

² *Leonard v. Hughlett*, 41 Md. 380; *Curson v. Monteiro*, 2 Johns. (N. Y.) 308; *Clifton v. Jackson Iron Co.*, 74 Mich. 183, H. & W. 659. Cf. *Saville v. Chalmers*, 76 Iowa, 325.

³ The period varies in the United States from ten to twenty years. Wood on Limitations of Actions, § 31 and appendix.

and his heirs by deed, the common law gave to the creditor a right to have his debt satisfied by the heir out of the lands of his ancestor; the liability thus imposed on the heir was extended to the devisee by 3 & 4 Will. & Mary, c. 14. s. 2. This statute was repealed by 11 Geo. IV. & 1 Will. IV. c. 47, only for the purpose of extending the creditor's remedy to some cases not provided for by the previous act.

During the present century, however, creditors by simple contract have also acquired a right to have their debts satisfied out of the lands of the debtor; but it should be noted that the specialty creditor can claim against the heir though not named in the deed, or against the devisee of real estate, without the intervention of the court of chancery, while the creditor by simple contract must get the estate administered in chancery in order to make good his claim. When the estate is so administered the creditor by specialty has, since 32 & 33 Vict. c. 46, no
 [55] priority over the simple *contract creditor, whether it be realty or whether it be personalty that is administered by the court.¹

44 & 45
 Vict. c. 41.
 § 59.

(e) A gratuitous promise, or promise for which the promisor obtains no consideration present or future, is binding if made under seal, is void if made verbally, or in writing not under seal. I have noted above that this feature of contracts under seal is sometimes explained by the solemnity of their form which is said to import consideration. The supposition is historically untrue, since it is the form alone which gives effect to the deed. The doctrine of consideration is, as we have seen, of a much later date than that at which the contract under seal was in full efficacy, an efficacy which it owed entirely to its form. And the doctrine of consideration, as it has devel-

(e) Gratuitous promise under seal is binding.

¹ In the American States generally specialties are given no preference over simple contracts in the administration of estates. 2 Kent, Comm. 416-419.

oped, has imposed limits on this peculiarity of the contract under seal, and has introduced exceptions to the general rule that a gratuitous promise made by deed is binding.¹

Mallan v.
May, 11 M.
& W. 685.

Collins v.
Blantern,
1 Sm. L. C.
p. 398.

At common law, contracts in restraint of trade, though under seal, must be shown to be reasonable; consideration, as well as the public interest, would seem to be an element in the reasonableness of the transaction. And the rule is general that if there be consideration for a deed, the party sued upon it may show that the consideration was illegal, or immoral, in which case the deed will be void.²

Equitable
view of
absence of
considera-
tion.

But it is in the chancery that we find this privilege most encroached upon. The idea of consideration as a necessary element of contract as well as of conveyance, if it did not actually originate in the chancery, has always met with peculiar favour there. It was by means of inferences drawn from the presence or absence of consideration that the covenant to stand seised, the bargain and sale of lands, and the resulting use first acquired validity. And in administering its peculiar remedies, where they are applicable to contract, equity followed the same principles.

See Part V.
ch. iii. § 3.

The court will not grant *specific performance* of a gratuitous promise, whether or no the promise is made by deed.³ And *absence of consideration is corroborative evidence of the presence of fraud or undue [*56]

¹ In some of the American States the presence of a seal is declared by statute to be only presumptive evidence of the presence of consideration in an executory contract. N. Y. Code Civ. Pro., § 840; Stimson's Am. St. Law, § 4121. Yet if the seal is used in such States for the purpose of giving effect to a gratuitous promise, where no consideration was intended, the import of the seal is the same as at common law. *Allier v. Aller*, 40 N. J. L. 446, H. & W. 82.

² *Brown v. Kinsey*, 81 N. C. 245, H. & W. 395; *Sterling v. Sinnickson*, 2 South (5. N. J. L.), 756, H. & W. 359.

³ Equity always requires actual consideration. *Lamprey v. Lamprey*, 29 Minn. 151; *Smith v. Wood*, 12 Wis. 425.

influence, on sufficient proof of which the court will *rectify* or *cancel* the deed.¹

The best illustration of a gratuitous promise under seal is supplied by a *bond*. A bond may be technically described as a promise defeasible upon condition subsequent; that is to say, it is a promise by *A* to pay a sum of money, which promise is liable to be defeated by a performance by *A* of a condition stated in the bond. The promise, in fact, imposes a penalty for the non-performance of the condition which is the real object of the bond. The condition desired to be secured may be a money payment, an act or a forbearance. In the first case the instrument is called a common money bond: in the second a bond with special conditions.

For instance:—

A promises *X*, under seal, that on the ensuing Christmas Day he will pay to *X* £500; with a condition that if before that day he has paid to *X* £250 the bond is to be void.

A promises *X*, under seal, that on the ensuing Christmas Day he will pay to *X* £500; with a condition that if before that day *M* has faithfully performed certain duties the bond is to be void.

Common law has differed from equity in its treatment of bonds much as it did in its treatment of mortgages.

Common law took the contract in its literal sense and enforced the fulfilment of the entire promise upon breach of the condition.

Equity looked to the object which the bond was intended to secure, and would restrain the promisee from obtaining more than the amount of money due under the condition or the damages which accrued to him by its breach.

Statutes have long since limited the rights of the promisee to the actual loss sustained by breach of the condition.

Bonds

Legal aspect of a bond.

Equitable aspect.

8 & 9 Will.
III. c. 11.
4 & 5 Anne,
c. 16.
23 & 24 Vict.
c. 126. § 25.

¹ Absence or inadequacy of consideration as corroborative evidence of fraud or undue influence. *Hall v. Perkins*, 3 Wend. (N. Y.) 626, H. & W. 311.

(iii) When necessary.

(a) Requirements by statute.

(3) *When it is essential to employ the contract under seal.*

It is sometimes necessary for the validity of a contract to employ the form of a deed.

*A sale of sculpture with copyright;^a a transfer of shares in companies governed by the Companies [57] Clauses Act;^b a transfer of a British ship or any share therein;^c a lease of lands, tenements, or hereditaments for more than three years, must be made under seal.^{d 1}

(b) At common law:

gratuitous promises,

Common law requires in two cases that a contract should be made under seal.

(a) A gratuitous promise, or contract in which there is no consideration for the promise made on one side and accepted on the other, is void unless made under seal.²

contracts with corporations.

(b) A corporation aggregate can only be bound by contracts under the corporate seal.

'The seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting however numerously attended is, after all, not the act of the whole body. Every member knows he is bound by what is done under the common seal and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing. Either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation.'

Mayor of Ludlow v. Charlton, 6 M. & W. 315.

Exceptions.

To this rule there are exceptions of two kinds. Matters of trifling importance, or daily necessary occurrence, do not require the form of a deed. The supply of coals to a workhouse, the hire of an inferior servant, furnish instances of such matters. Or, again, where a municipal corporation owned a graving dock in constant use, it was held that agreements for the admission of ships might be made by simple contract.

Nicholson v. Bradfield Union, L. R. 1 Q. B. 620. Wells v. Mayor of Kingston on Hull, L. R. 10 C. P. 402.

^a 54 Geo. III. c. 56.

^b 8 & 9 Vict. c. 16. § 14.

^c 17 & 18 Vict. c. 104. § 55.

^d 29 Car. II c. 3. §§ 1 & 2, and 8 & 9 Vict. c. 106. § 3.

¹ In general conveyances of interests in lands must be by deed. Stimson, Am. St. Law, § 1471.

² *Williams v. Forbes*, 114 Ill. 167; *Krell v. Codman*, 154 Mass. 454.

Trading corporations may through their agents enter into simple contracts relating to the objects for which they were created.

‘A company can only carry on business by agents, — managers and others; and if the contracts made by these persons are contracts which
[*58] *relate to the objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding on the company, though not under seal.’

South of Ireland Colliery Co. v. Waddle. L. R. 3 C. P. 469.

In addition to the common law exceptions to the general rule, the legislature has in some cases freed corporations from the necessity of contracting under seal, and provided other forms in which their common assent may be expressed.

It has been questioned whether, when a corporation enters into a contract not under seal, and the contract has been executed in part, such execution gives rights to the parties which they would not have possessed if the contract had remained executory. Where a corporation has done all that it was bound to do under a simple contract it may sue the other party for a non-performance of his part. But there is no doubt that a part-performance of a contract by a corporation will not take the case out of the general rule, and entitle it to sue.

Effects of part-performance.

Fish-mongers' Company v. Robertson, 5 M. & Gr. 192.

Mayor of Kidderminster v. Hardwick, L. R. 9 Ex. 24.

Nor can a corporation be sued on contracts not under seal of which it has enjoyed a partial benefit; indeed it would seem that entire performance by the plaintiff will only give him a remedy where the amount is small and the work necessary.¹

Per Bramwell, L.J., Hunt v. Wimbledon Local Board, 4 C. P. D. at p. 53.

SIMPLE CONTRACT.

§ 3. *Simple contracts required to be in writing.*

We have now dealt with the contract which is valid by reason of its form alone, and we pass to the contract which

(3) Simple contracts.

¹ In the American States generally a corporation is required to use a seal only when a natural person would be so required. *Bank of Columbia v. Patterson*, 7 Cranch (U. S.), 299; *Christian Church v. John-*

All require consideration.

depends for its validity upon the presence of consideration. In other words, we pass from the formal to the simple contract, or from the contract under seal to the *parol* contract, so called because, with certain exceptions to which I will at once refer, it can be entered into by word of mouth.

Some must also be expressed in writing.

Certain simple contracts cannot be enforced unless written evidence of the terms of the agreement and of the parties to it is produced; but form is here needed, not as giving efficacy *to the contract, but as evidence of its existence. Consideration is as necessary as [*59] in those cases in which no writing is required: 'if contracts be merely written and not specialties, they are *parol* and consideration must be proved.'

See post, p. 75.

These are therefore none the less simple contracts, because written evidence of a certain kind is required concerning them.

The statutory requirements of form in simple contract are briefly as follows:—

Statutory requirements

1. A bill of exchange was required to be in writing by the custom of merchants, adopted into the common law. A promissory note was subject to a like requirement by 3 & 4 Anne, c. 9. Both documents are now governed by the Bills of Exchange Act, which further provides that the acceptance of a bill of exchange must also be in writing.¹

45 & 46 Vict. c. 61. § 1.

2. Assignments of copyright must be in writing. This subject is dealt with by numerous statutes.²

45 & 46 Vict. c. 61. § 17.

3. Contracts of marine insurance must be made in the form of a policy.³

80 Vict. c. 23.

son, 53 Ind. 273. Where a corporation has received a benefit under a contract *ultra vires*, it is liable in quasi-contract. *Central Trans. Co. v. Pullman Car Co.*, 139 U. S. 24, 60, H. & W. 223 n.

¹ Acceptance must be in writing in many American States. *Stimson*, Am. St. Law, § 4720.

² U. S. Rev. St., §§ 4898, 4955.

³ Insurance contracts are good in *parol* unless required by statute to be in writing. *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574.

Parliament which govern companies generally or refer to particular companies.¹

5. An acknowledgment of a debt barred by the Statute of Limitation must be in writing signed by the debtor, or by his agent duly authorized.²

9 Geo. IV.
c. 14. § 1.
19 & 20 Vict
c. 97. § 18.

6. The Statute of Frauds, 29 Car. II. c. 3. § 4 requires that written evidence should be supplied in the case of certain contracts.³

Statute of
Frauds.

7. The Sale of Goods Act, 1893, 56 & 57 Vict. c. 71. § 4 requires that, in default of certain specified conditions, written evidence should be supplied in the case of contracts for the sale of goods worth £10 or upwards.⁴

Sale of
Goods Act
[Replacing
29 Car. II.
c. 3. § 17.]

The requirements of the Statute of Frauds and of the Sale of Goods Act are those which need special treatment, and with these I propose to deal.

¹ Stimson, Am. St. Law, § 8150.

² N. Y. Code Civ. Pro., § 395; Stimson, Am. St. Law, § 4147.

³ Re-enacted in some form in all the American States except Maryland, Louisiana, and New Mexico. Stimson, Am. St. Law, § 4140.

⁴ 29 Charles II. c. 3, § 17, is re-enacted in some form in most of the American States. Stimson, Am. St. Law, § 4144.

Other contracts sometimes required to be in writing will be found in Stimson, Am. St. Law, §§ 4146-4148.

As regards this section we have to consider three matters.

- (1) The nature of the contracts specified.
- (2) The form required.
- (3) The effect upon such contracts of a non-compliance with the provisions of the statute.

(1)

(i) Provisions of section 4.

We will first note the characteristics of the five sorts of contract specified in the section.

(a) Executors.

Special promise by an executor or administrator to answer damages out of his own estate.

Nature of executor's liability.

The liabilities of an executor or administrator in respect of the estate of a deceased person are of two kinds. At common law he may sue and be sued upon obligations

1844-1850,
7 T. R. 350
(n).

agent.² It is almost needless to add that in this, and in

¹ The language of this section varies greatly in the enactments of the American States. Some States omit one or more of the clauses. In most the section is broken up and the clauses incorporated under different heads. See Stimson, Am. St. Law, §§ 4140-4143.

² But not where the promise is to pay money out of his own estate, not as damages for which the decedent's estate is liable, but to subserve some end of his own. *Bellows v. Sowles*, 57 Vt. 164, H. & W.

all other contracts under the section, the presence of writing will not atone for the absence of consideration.

Any promise to answer for the debt, default, or miscarriage of another person. (b) Guarantors.

The promise here described is a contract of guarantee or suretyship. The following points may be noted in the application of the statute.

(a) The promise must be distinguished from an indemnity, or promise to save another harmless from the results of a transaction into which he enters at the instance of the promisor. The promise differs from indemnity.

‘Whether any contract is the one or the other is often a very nice question. One test is if the promisor is totally unconnected with the transaction except by means of his promise to pay the loss, the contract is a guarantee: if he is to derive some benefit from it, his contract is an indemnity.’ Lord Esher, *M. P. Sutton & Co v. Grey*, [1894] 1 Q. B. 288.

A surer test is that there must be three parties in contemplation; *M*, who is actually or prospectively liable to *X*, and *A*, who in consideration of some act or forbearance on the part of *X* promises to answer for the debt, default, or miscarriage of *M*.

X, a bailiff, was about to arrest *M*. *A* promised to pay a sum of £17 on a given day to *X* if he would forbear to arrest *M*. This was held an independent promise of indemnity from *A* to *X* which need not be in writing.¹ Reader v. Kingham, 13 C. B., N.S. 344, and see *In re Hoyle*, [1898] 1 Ch. 98.

A promised a firm of which he was a member that if his son failed to pay a debt due to the firm he would pay it himself. This was held not to be a guarantee to the firm, for *A* could not make a promise to himself and he was a member of the firm. His promise was an indemnity to the other partners against loss which they might suffer from trusting his son.

¹ This is followed in many American States. *Anderson v. Spence*, 72 Ind. 315. But the contrary doctrine is held in many others. *May v. Williams*, 61 Miss. 125, H. & W. 113.

Necessi-
tates pri-
mary lia-
bility of
third
party,

*(b) There must be a liability, actual or prospec-
tive, of a third party for whom the promisor under-
takes to answer. If the promisor makes himself primarily
liable the promise is not within the statute, and need not
be in writing. [*62]

Per Curiam
in *Birkmyr*
v. *Darnell*, 1
Sm. L.C. 310.

‘If two come to a shop and one buys, and the other, to
gain him credit, promises the seller “*If he does not pay*
you, I will,” this is a collateral undertaking and void with-
out writing by the Statute of Frauds. But if he says,
“*Let him have the goods, I will be your paymaster,*” or “*I*
will see you paid,” this is an undertaking as for himself,
and he shall be intended to be the very buyer and the
other to act as but his servant.’¹

and a real
liability,

(c) The liability may be prospective at the time the
promise is made, as a promise by *A* to *X* that if *M* employs
X he (*A*) will go surety for payment of the services ren-
dered. Yet there must be a principal debtor at some time:
else there is no suretyship, and the promise, though not in
writing, will nevertheless be actionable. Thus if *X* says
to *A* ‘If I am to do this work for *M* I must be assured of
payment by some one,’ and *A* says ‘do it; I will see you
paid,’ there is no suretyship, unless *M* should incur liability
by giving an order.²

Mount-
stephen v.
Lakeman,
L. R. 7 H. L.
17, and see
L. R. 7 Q. B.
202.

(d) If there be an existing debt for which a third party
is liable to the promisee, and if the promisor undertake to
be answerable for it, still the contract need not be in writ-
ing if its terms are such that it effects an extinguishment
of the original liability. If *A* says to *X*, ‘give *M* a receipt
in full for his debt to you, and I will pay the amount,’
this promise would not fall within the statute. The lia-
bility of the third party must be a continuing liability.³

Goodman
v. Chase,
1 B. & Ald.
297.

and con-
tinuous.

May arise
from
wrong.

(e) The debt, default, or miscarriage spoken of in the
statute will include liabilities arising out of wrong as

¹ *Boston v. Farr*, 148 Pa. St. 220; *Peyson v. Conniff*, 32 Neb. 269.

² *Maurin v. Fogelberg*, 37 Minn. 23; *Mead v. Watson*, 57 Vt. 426.

³ *Teeters v. Lamborn*, 43 Oh. St. 144; *Eden v. Chaffee*, 160 Mass. 225.

well as out of contract. So in *Kirkham v. Marter*, *M* wrongfully rode the horse of *X* without his leave, and killed it. *A* promised to pay *X* a certain sum in consideration of his forbearing to sue *M*, and this was held a promise to answer for *the miscarriage of another within [*63] the statute.¹

2 B. & Ald.
613.

(f) This contract is an exception to the general rule that 'the agreement or some memorandum or note thereof,' which the statute requires to be in writing, must contain the consideration as well as the promise: 19 & 20 Vict. c. 97. s. 3.²

Consideration need not be expressed.
See p. 62.

Agreement made in consideration of marriage.

The agreement here meant is not the promise to marry, (the consideration for this is the promise of the other party,) but the promise to make a payment of money or a settlement of property in consideration of, or conditional upon a marriage actually taking place.³

(c) Marriage agreements.
Not a promise to marry.

Contract or sale of lands or hereditaments or any interest in or concerning them.

(d) Land contracts.

The rules which govern the forms of sale or conveyance of land are to be found elsewhere than in the Statute of Frauds, and are not a part of the law of contract. But agreements made with a view to such sales may give rise to diffi-

What is an interest in land.

^a Where such a promise is made by one of the parties to the engagement a question might arise which has never, so far as I know, been presented to the courts — What is the consideration for a promise, in such a case, to pay money or settle property? The promisee is already under a legal liability to carry out the promise to marry.

¹ *Combs v. Harshaw*, 63 N. C. 198; *Duffy v. Wunsch*, 42 N. Y. 243.

² In the United States this would depend upon considerations common to all the contracts included in this section or upon special statutes.

³ *McAnnulty v. McAnnulty*, 120 Ill. 26; *White v. Bigelow*, 154 Mass. 593. The agreement to settle property may be made at the same time as the agreement to marry and yet rest upon another consideration, so as to take the case out of the statute. *Larsen v. Johnson*, 78 Wis. 300.

culty in defining an *interest in land* such as would fall within the section. We may say that contracts which are preliminary to the acquisition of an interest, or such as deal with a remote and inappreciable interest, are outside the section. Such would be an agreement to pay for an investigation of title; or to transfer shares in a railway company which, though it possesses land, gives no appreciable interest in the land to its shareholders.¹

Fructus
indus-
trialis et
naturales.

Difficulties again have arisen in interpreting this section with reference to the sale of crops; and a distinction has been drawn as to these between what are called emblements, crops produced by cultivation, or *fructus industriales*, and growing grass, timber, or fruit upon trees, which are called *fructus naturales*.² [*64]

Fructus industriales do not under any circumstances constitute an interest in land. *Fructus naturales* are considered to do so if the sale contemplates the passing of the property in them before they are severed from the soil. Where property is to pass after severance both classes of crops are goods within the meaning of section 4 of the Sale of Goods Act. Where property in *fructus industriales* is intended to pass before severance, it seems now to be clear that they fall within the meaning of the Sale of Goods Act.

56 & 57
Vict. c. 71. §
62.

(e) Agree-
ments
beyond a
year.

Agreement not to be performed within the space of one year from the making thereof.

Two points should be noted with regard to this form of agreement.

(a) The fact that a contract may not be, or is not performed within the year does not bring it under the statute

Peter v.
Compton,
1 Sm. L. C.
359, 9th ed.
Skinn, 359.

¹ *Heyn v. Philips*, 37 Cal. 529, H. & W. 118; *Hoerner v. Frazier*, 65 Md. 1.

² *Hirth v. Graham*, 50 Oh. St. 57, H. & W. 124; *Whitmarsh v. Walker*, 1 Met. (Mass.) 313; *Purner v. Piercy*, 40 Md. 212; *Killmore v. Howlett*, 48 N. Y. 569.

unless 'it appears by the whole tenor of the agreement that it is to be performed after the year.'¹

On the other hand, where an agreement is clearly meant to last beyond the year, it is not taken out of the statute by the introduction of a condition subsequent, the happening of which may bring it to an end within the year.²

Davey v. Shannon,
4 Ex. D. 81

(b) The contract does not fall within the section if that which one of the parties is to do, is all to be done within the year. *A* was tenant to *X* under a lease of 20 years and promised verbally to pay an additional £5 a year during the remainder of the term in consideration that *X* laid out £50 in alterations: *X* did this and *A* was held liable upon his promise, since the consideration for it had been executed within the year.³

Donellan v. Read, 3 B. & A. 899.

(2)

The form required is the next point to be considered. What is meant by the requirement that 'the agreement or some memorandum or note thereof shall be in writing and

(ii) Requirements of form.

*signed by the party to be charged therewith or some other person thereunto by him lawfully authorized'?

We may, with regard to this part of the subject, lay down the following rules.^a

(a) The form required does not go to the existence of

(a) The form is merely evidentiary.

^a With the exception of rule (d), what is said under this head may be taken to apply to the 4th section of the Sale of Goods Act, as well as to the 4th section of the Statute of Frauds.

¹ *Kent v. Kent*, 62 N. Y. 560; *Peters v. Westborough*, 19 Pick. (Mass.) 364.

² *Wahl v. Barnum*, 116 N. Y. 87. Cf. *Blake v. Voigt*, 134 N. Y. 69.

³ Accord: *Piper v. Fosher*, 121 Ind. 407; *Smalley v. Greene*, 52 Iowa, 241. Contra: *Whipple v. Parker*, 29 Mich. 369; *Marcy v. Marcy*, 9 Allen (Mass.), 8.

A further point to be noted is that this provision has been held in this country to apply to contracts to marry. *Nichols v. Weaver*, 7 Kans. 373; *Lawrence v. Cooke*, 56 Me. 193. Contra: *Brick v. Gannar*, 36 Hun (N. Y.), 52.

the contract. The contract exists though it may not be clothed with the necessary form, and the effect of a non-compliance with the provisions of the statute is simply that no action can be brought until the omission is made good.

Illustrations.

It is not difficult to illustrate this proposition. The note in writing may be made so as to satisfy the statute, at any time between the formation of the contract and the commencement of an action: or the signature of the party charged may be affixed before the conclusion of the contract.¹

Stewart v. Eddowes,
L. R. 9 C.P.
811.

Thus one party to the contract may sign a rough draft of its terms, and acknowledge his signature by way of concluding the contract when the draft has been corrected.

Reuss v. Pickesley,
L. R. 1
Exch. 342.

Again, an offer containing the names of the parties and the terms of an offer signed by the offeror will bind him though the contract is concluded by a subsequent parol acceptance. In the first of these cases the signature of the party charged — in the second not the signature only but the entire memorandum — was made before the contract was concluded. It may even happen that one of the parties to a contract which he has not signed may acknowledge it in a letter which supplies his signature and contains at the same time an announcement of his intention to repudiate the contract. He had then supplied the statutory evidence, and, as the contract had already been made, his repudiation is nugatory.²

Buxton v. Rust, L. R.
7 Exch.
1 & 279.

(b) The parties must appear.

(b) The parties and the subject-matter of the contract must appear in the memorandum.

The parties must be named, or so described as to be identified with ease and certainty. A letter beginning 'Sir,' *signed by the party charged but not containing the name of the person to whom it is addressed, [*66]

¹ *Bird v. Munroe*, 66 Me. 337, H. & W. 92. Cf. *McAnnulty v. McAnnulty*, 120 Ill. 26.

² *Louisville &c. Co. v. Lorick*, 29 S. Car. 533.

has more than once been held insufficient to satisfy the statute.¹

Where one of the parties is not named, but is described, parol evidence will be admitted for the purpose of identification if the description points to a specific person, but not otherwise. If *A* contracts with *X* in his own name, being really agent for *M*, *X* or *M* may show that *M* was described in the memorandum in the character of *A*.²

If property is sold by an agent on behalf of the *owner* or *proprietor* it may be proved by parol that *X* was the owner or proprietor; if the sale was made by the agent on behalf of the *vendor*, of his *client*, or his *friend*, there would be no such certainty of statement as would render parol evidence admissible.

The same principle is applied to descriptions of the subject-matter of a contract.

A receipt, signed by *X* for deposit money 'on property purchased at £420 at the Sun Inn, Pinxton, on March 29,' when taken together with conditions of sale connected with the receipt, was considered sufficiently definite to admit of the introduction of parol evidence to show what the specific property was; while a receipt for money paid by *A* to *X* 'on account of his share in the Tividale mine' was held to be too uncertain as to the respective rights and liabilities of the parties, to be identified by parol evidence.³

(c) The memorandum may consist of various letters and papers, but they must be connected and complete.⁴

The statute requires that the terms, and all the terms of the contract, should be in writing, but these terms need not appear in the same document: a memorandum may

Williams v. Lake, 2 E. & E. 349.
Williams v. Jordan, 6 Ch. D. 517.

Trueman v. Loder, 11 A. & E. 589.

Rossiter v. Miller, 8 App. Ca. 1141.

Potter v. Duffield, 18 Eq. 4.

Shardlow v. Cotterell, 20 Ch. D. 90.

Caddick v. Skidmore, 2 De G. & J. 52.

(c) The terms may be collected from various documents:

¹ *Grafton v. Cummings*, 99 U. S. 100.

² *Jones v. Dow*, 142 Mass. 130.

³ *Doherty v. Hill*, 144 Mass. 465; *Ryan v. United States*, 136 U. S. 68.

⁴ *Bayne v. Wiggins*, 139 U. S. 210; *O'Donnell v. Leeman*, 43 Me. 158, H. & W. 100.

be proved from several papers or from a correspondence, but the connexion must appear from the papers themselves.

but must
be con-
nected on
the face of
them;

4 C. P. D.
454.

44 Ch. D.
205.

11 East, 142.

Parol evidence is admissible to connect two documents where each obviously refers to another, and where the two when thus connected make a contract without further explanation. This is the principle laid down in *Long v. Millar*, and followed in the more recent case of *Oli-^[*67]ver v. Hunting*. It is not inconsistent with the decision in the often-cited case of *Boydell v. Drummond*. There two forms of prospectus were issued by the plaintiff, inviting subscriptions to an illustrated edition of Shakespeare. Subscribers might purchase the prints only, or the work in its entirety. The defendant entered his name in a book in the plaintiff's shop, entitled 'Shakespeare Subscribers, their signatures,' afterwards he refused to carry out his purchase. It was held that the subscription book and the prospectus were not connected by documentary evidence, and that parol evidence was not admissible to connect them. But though the rule as to the admission of parol evidence has been undoubtedly relaxed since 1809, it seems that *Boydell v. Drummond* would not now be decided differently, for the evidence sought to be introduced went further than the mere connexion of two documents and seems to have dealt with the nature and extent of the defendant's liability.

Per Bayley,
J.

must be
complete.

Again, the terms must be complete in the writing. Where a contract does not fall within the statute, the parties may either (1) put their contract into writing, (2) contract only by parol, or (3) put some of the terms in writing and arrange others by parol. In the latter case, although that which is written may not be varied by parol evidence, yet the terms arranged by parol are proved by parol, and they then supplement the writing, and so form one entire contract. But where a contract falls within the statute, all its terms must be in writing, and the offer of parol evidence of terms not appearing in the writing would

Greaves v.
Ashlin,
8 Camp, 426.

at once show that the contract was something other than that which appeared in the written memorandum.¹

(d) The consideration must appear in writing as well as the terms of the promise sued upon. This rule is not wholly applicable to the 17th section, but it has been settled with regard to the 4th since the year 1804.²

[*68] *But an exception has been made by the Mercantile Law Amendment Act, in the case of the 'promise to answer for the debt, default or miscarriage of another': such a promise shall not be

(d) Consideration must appear in writing.
Wain v. Warlters, 5 East, 10.

'Deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.'³

19 & 20 Vict. c. 97. § 3.

(e) The memorandum must be signed by the party charged or his agent.

The contract therefore need not be enforceable at the suit of both parties; it may be optional to the party who has not signed to enforce it against the party who has. The signature need not be an actual subscription of the party's name, it may be a mark; nor need it be in writing, it may be printed or stamped; nor need it be placed at the end of the document, it may be at the beginning or in the middle.⁴

(e) Signature of party or agent.
See Benjamin on Sales, pp. 231-234, 4th ed.

¹ *O'Donnell v. Leeman*, *supra*; *Drake v. Seaman*, 97 N. Y. 230.

² The American courts have differed widely as to the necessity of expressing the consideration. In some States the matter has been settled by statute either requiring or not requiring that the consideration be expressed. Stimson, Am. St. Law, § 4142. The better view seems to be that so far as the consideration is an executory term in the contract it must appear in the same way as all other essential terms. *Drake v. Seaman*, 97 N. Y. 230; *Barney v. Forbes*, 118 N. Y. 580. The phrase "for value received" has been held sufficient. *Osborne v. Baker*, 34 Minn. 307.

³ So also in some American States. *Davis v. Tift*, 70 Ga. 52; *Goodnow v. Bond*, 59 N. H. 150.

⁴ *Clason v. Bailey*, 14 Johns. (N. Y.) 484, H. & W. 102; *Sanborn v. Flagler*, 9 Allen (Mass.), 474. But where the statute requires the

But it must be intended to be a signature, and as such to be a recognition of the contract, and it must govern the entire contract.

These rules are established by a number of cases turning upon difficult questions of evidence and construction. The principal cases are elaborately set forth in Benjamin on Sales, pp. 230-240, but a further discussion of them would here be out of place.

4th ed.
[6th Am. ed.
pp. 208-212.]

(iii) Effect
of non-com-
pliance.

Statute
does not
avoid con-
tract,

(3)

It remains to consider what is the position of parties who have entered into a contract specified in section 4, but have not complied with the provisions of the section. Such a contract is neither void nor voidable, but it cannot be enforced by action because it is incapable of proof.¹

Supra, p. 65.

I have show that a memorandum in the requisite form, whether made before or after the fact of agreement, will satisfy the requirements of the statute. But the nature of the disability attaching to parties who have not satisfied these requirements may be illustrated by cases in which they * have actually come into court without supply- [*69]
ing the missing form.

12 C. B. 801.

In the case of *Leroux v. Brown*, the plaintiff sued upon a contract not to be performed within the year, made in

memorandum to be "subscribed," the signature must be at the end of the memorandum. *James v. Patten*, 6 N. Y. 9. The want of mutuality is generally held no objection to the enforcement of the contract against the party signing; but one or two jurisdictions hold otherwise. *Wilkinson v. Heavenrich*, 58 Mich. 574; *Krohn v. Bantz*, 68 Ind. 277.

¹ The statute does not affect executed contracts. *Brown v. Farmers' Loan & Trust Co.*, 117 N. Y. 266. In executory contracts it affects the remedy only, and not the validity of the contract. *Townsend v. Hargraves*, 118 Mass. 325; *Browning v. Parker*, 17 R. I. 183. Some courts require it to be specially pleaded as a defence unless the complaint or declaration alleges a writing, in which case a general denial may be sufficient. *Wells v. Monihan*, 129 N. Y. 161; *Crane v. Powell*, 139 N. Y. 379; *Graffam v. Pierce*, 143 Mass. 386; *McClure v. Otrich*, 118 Ill. 320; but see *Dunphy v. Ryan*, 116 U. S. 491; *Suman v. Springate*, 67 Ind. 115.

France and not reduced to writing. French law does not require writing in such a case, and by the rules of private international law the validity of a contract, so far as regards its formation, is determined by the *lex loci contractus*. The procedure however, in trying the rights of parties under a contract, is governed by the *lex fori*, and the mode of proof would thus depend on the law of the country where action was brought. If, therefore, the 4th section avoided contracts made in breach of it, the plaintiff could have recovered, for his contract was good in France where it was made, and the *lex loci contractus* would have been applicable. If, on the other hand, the 4th section affected procedure only, the contract, though not void, was incapable of proof.

but contract cannot be proved.

Leroux tried to show that his contract was void by English law. He would then have succeeded, for he could have proved, first, his contract, and then the French law which made it valid. But the court held that the 4th section dealt only with procedure, did not avoid his contract, but only made it incapable of proof, unless he could produce a memorandum of it. This he could not do, and so lost his suit.¹

The rule is further illustrated by the mode in which equity has dealt with such contracts.

The doctrine of part-performance.

¹ "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought." *Scudder v. Union Nat. Bk.*, 91 U. S. 406, 412, in which it was held that a bill drawn and accepted by parol in Illinois, but payable in Missouri, was enforceable in Illinois although the statute of Missouri required the acceptance to be in writing. So a parol contract made in Rhode Island to be performed in New York is enforceable in Rhode Island though not enforceable in New York. *Hunt v. Jones*, 12 R. I. 265. See also *Downer v. Chesebrough*, 36 Conn. 39. *Contra*: *Decosta v. Davis*, 24 N. J. L. 319; *Denny v. Williams*, 5 Allen (Mass.), 1.

Where one of the parties had performed his part of the contract equity would admit parol evidence to show that a contract had been made.¹ The Judicature Act enables all the divisions of the High Court to recognize and administer equitable rights and remedies: and so in *Britain v. Rossiter* an action was brought for wrongful dismissal, in breach of a verbal contract of service not to be performed within the year.

11 Q. B. D.
123.

To what
contracts
applicable.

The court held that the rule of equity was inapplicable to contracts which did not relate to an interest in land.

*‘The true ground of the doctrine,’ said Cotton, L.J., ‘is, that if the court found a man in occupation of land, or doing such acts with regard to it as would *prima facie* make him liable to an action of trespass, the court would hold that there was strong evidence from the nature of the user of the land that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken.’ [*70]

But this limitation of the doctrine seems to be somewhat arbitrary, and is not fully borne out by earlier authorities: probably the true rule is that formulated by Kay, J., in *McManus v. Cooke*, after a careful examination of all the cases bearing on the subject.

35 Ch.D. 697.

‘It is probably more accurate to say that the doctrine of part-performance applies to all cases in which a court of equity would entertain a suit for specific performance if the alleged contract had been in writing.’

¹ “Equity proceeds on the ground that it would be a fraud for the vendor to allow the vendee to continue in possession and expend his money in improvements, so as to render it impossible for the parties to be restored to their original situations, confessedly on the faith of an agreement of sale, and then try to avail himself of the Statute of Frauds to avoid the contract.” *Nibert v. Baghurst*, 47 N. J. Eq. 201, 207; *Morrison v. Herrick*, 130 Ill. 631; *Beardsley v. Duntley*, 69 N. Y. 577. Some of the American States have special legislation on the subject. Stimson, Am. St. Law, § 4145. Owing to the peculiarities of the history of equity jurisdiction in some of the States, the doctrine has been denied or limited; it has only recently been adopted in some. *Potter v. Jacobs*, 111 Mass. 32; *Niles v. Davis*, 60 Miss. 750; *Douglass v. Snow*, 77 Me. 91.

In the case of contracts to which the doctrine applies, it is not enough that services should have been rendered in consideration of a promise to grant lands, or even that the price should have been paid wholly or in part. 'The acts relied upon as part performance, must be unequivocally and in their own nature referable to some such agreement as that alleged.'

Per Lord
Selborne, C.,
in *Maddison*
v. *Alderson*,
8 App. Ca.
479.

7 Q.B.D.174.

So in *Maddison v. Alderson* the House of Lords, affirming the judgment of the Court of Appeal, held that where a promise of a gift of land was made to the plaintiff in consideration that she remained in the service of the promisor during his lifetime, the continuance of service for the required period could not be regarded as exclusively referable to the promised gift. It might have rested on other considerations, and so the statute excluded the admission of parol evidence of the promise.

56 & 57 Vict. c. 71. § 4.

Sale of Goods Act.

Statute of
Frauds :
Section 17.

(1) A contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the contract, or in part payment- or unless some note or memorandum in writing of the contract [*71] ^{*be made and signed by the party to be charged or his agent} in that behalf.^a

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.^b

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which

^a This sub-section contains the substance of § 17, now repealed, of the Statute of Frauds. The language is altered so as to leave no doubt that the effect of this section, both as to the form required and the effect of its absence, is identical with that of § 4 of the Statute of Frauds.

^b This sub-section embodies the section, now repealed, of Lord Tenterden's Act, which settled the doubt as to the operation of the 17th section of the Statute of Frauds upon an agreement to sell.

recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.^{a 1}

We have here to consider, as in the case of the 4th section of the Statute of Frauds—

(1) The nature of the contract.

(2) The form required.

(3) The effect of non-compliance with these requirements.

(1)

(i) What it includes.

The statute just cited and the section of it which we have before us deal with two sorts of contract. It is important to understand the nature and effects of these not only in respect of the general law of contract, but also in order to appreciate the points arising in many of the cases which illustrate the law.

Sale and agreement to sell.

The *contract of sale* includes two different things, a *sale* and an *agreement to sell*, and the 4th section deals with both. The essential difference appears in an earlier section of the act.

‘Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale;

^a As to the law which this sub-section embodies, see *Page v. Morgan*, (1885) 15 Q. B. D. 228. *Taylor v. Smith*, (1893) 2 Q. B. (C. A.) 65.

¹ See Stimson's Am. St. Law, § 4144. Sub-sections (2) and (3) of the statute as given above do not appear in the American statutes, except that a very few States have legislation upon the subject of goods not *in esse* or to be manufactured; where there is no legislation on that subject the cases are irreconcilable, as will appear hereafter. Sub-section (3) is believed not to accord with the American law as developed in the decisions.

In the United States the statute is construed to cover *choses in action*. *Greenwood v. Law*, 55 N. J. L. 168, H. & W. 131. Some States include *choses in action* in the statute itself.

As to whether the subject-matter of the sale is personalty, and so within this section allowing one of three alternative methods of satisfying the statute and requiring that only if the article be above a certain value, or whether it is realty, and so within the “Fourth Section” requiring a writing however small the value, has been discussed. See *ante*, pp. 73-4; *Hirth v. Graham*, 50 Oh. St. 57, H. & W. 124; *Higgins v. Kusterer*, 41 Mich. 318; *Northern v. Lathrop*, 1 Ind. 113, H. & W. 123.

but where the transfer of the property in the goods is to take place at some future time, or subject to some condition thereafter to be fulfilled, the contract is called "an agreement to sell."'

56 & 57 Vict.
c. 71. § 1.
sub-§ 3.

[*72] *A subsequent section of the act supplies us with the tests which determine whether a contract is a *sale* or an *agreement to sell*. To constitute a *sale* the goods sold must be specific, they must be in a deliverable state, and the sale must be unconditional.

If A orders any ten sheep out of X's flock the goods are not specific. If he orders a table which he sees in course of making in X's shop the goods are incomplete. If he buys X's stack of hay at so much a ton, the price to be ascertained when the hay is taken down and weighed, there is yet something to be done to fix the price.

But where the conditions of a sale are satisfied the contract operates as a *conveyance*. When, and so soon as, the parties are agreed the property in the goods passes to the buyer: he has the remedies of an owner in respect of the goods themselves besides an action *ex contractu* against the seller if the latter fail to carry out his bargain, or part with the goods to a third party: the goods stand at his risk, if they are destroyed the loss falls on him and not on the seller.

It is further important to bear in mind, not only that the difference between a sale and an agreement to sell is the difference between conveyance and contract, but that an agreement to sell may become a sale on the fulfilment of the conditions on which the property in the goods is to pass to the buyer.

As a rule there is no great difficulty in determining whether, as a fact, these conditions have been fulfilled. But questions sometimes arise which admit of some doubt, in cases where there is an agreement for the purchase of goods which are not specific, and the seller has to *appropriate the goods to the contract*. Upon such appropriation the contract becomes a *sale*: it is therefore desirable to as-

certain the precise moment at which property and risk pass to the buyer.

If the buyer selects the goods to be appropriated, if he approves the selection made by the seller, or if the goods are delivered to a carrier on the authority of the buyer the appropriation takes place at the moment of approval, or of delivery. *If, however, the seller has selected the goods on the authority of the buyer, but without [*73] his express approval, doubts may arise whether his selection is irrevocably binding upon him or whether it merely expresses an intention which he may alter. The question is one which I will not discuss here; it is a part of the subject of the special contract of sale.¹

Chalmers,
Sale of
Goods Act,
pp. 41-43.

Not work
and
labour.

A different sort of question has arisen in cases where skilled labour has been expended on the thing sold in pursuance of the contract, and before the property is transferred. It has been asked whether the contract is a contract of sale or for the hire of services. The law may be taken to be now settled, that, whatever the respective values of the labour and the material, if the parties contemplate the ultimate delivery of a chattel the contract is for the sale of goods.

'I do not think,' said Blackburn, J., 'that the test to apply in these cases is whether the value of the work exceeds that of the materials used in its execution: for if a sculptor was employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would in my opinion be nevertheless for the sale of a chattel.'²

Lee v.
Griffin, 1 B.
& S. 272.

¹ The questions raised by the author as to the time when the property in the goods passes do not affect the operation of the statute of frauds. The statute applies to all contracts which remain in any respect unperformed, so that the aid of a court is asked to compel performance or to adjudge damages for non-performance, whether the property in the goods has already passed or not. Bennett's notes to Benjamin on Sales (6th ed.), p. 104. But the statute does not apply to a fully executed contract. *Brown v. Farmers' &c. Co.*, 117 N. Y. 266.

² In the United States the simple test established by the English

(2)

As to the form, it is enough to say that where, in absence of a part acceptance and receipt or part payment, a note or memorandum in writing is required, the rules applicable to contracts under § 4 of 29 Car. II. c. 3 apply to contracts under the Sale of Goods Act with one exception. (ii) Difference as to form from § 4.

The consideration for the sale need not, under this section, appear in writing unless the price is fixed by the parties. It then becomes a part of the bargain and must appear in the memorandum. Since the enactment only applies to contracts for the sale of goods, it will be presumed, if no consideration for the sale be set forth, that there is a promise to pay a reasonable price: but this presumption may be rebutted by evidence of an express verbal agreement as to price, so as to show that a memorandum which does not contain the price is insufficient.¹

Hoadley v. McLaine, 10 Bing. 482.

court in *Lee v. Griffin*, and embodied in the Sale of Goods Act, has not generally been adopted. It prevails, perhaps, in one or two states. *Brown v. Sanborn*, 21 Minn. 402; *Hardell v. McClure*, 1 Chandl. (Wis.) 271; *Burrell v. Highleyman*, 33 Mo. App. 183. Two opposing views divide generally the American decisions. (1) The New York rule is that if the article is in existence as a subject-matter of sale at the time of the formation of the contract, the contract is a sale and not one for work and labor, although the seller is to do some work upon the article to adapt it to the uses of the purchaser. *Cooke v. Millard*, 65 N. Y. 352. But otherwise if the article be not so in existence at the time of the formation of the contract. *Parsons v. Loucks*, 48 N. Y. 17. (2) The Massachusetts rule is that, "a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute." *Goddard v. Binney*, 115 Mass. 450, H. & W. 127; and see *Pitkin v. Noyes*, 48 N. H. 294. The English rule looks to the time of the performance of the contract. The New York rule looks to the time of the formation of the contract. The Massachusetts rule looks to the nature of the contract itself.

¹ *Ide v. Stanton*, 15 Vt. 685.

*(3)

[*74]

(iii) Does
§ 17 differ
in effect
from § 4?

It remains to note that if there be no acceptance and receipt, no part payment, and no memorandum or note in writing, the section declares that the contract shall not be 'enforceable by action.'

The Sale of Goods Act has thus set at rest another question which, though practically settled,^a had remained for a long time uncertain in the case of the 17th section of the Statute of Frauds. Like the 4th section of that statute, the requirements of the Sale of Goods Act do not affect the validity of the contract but only the proof of it.^{a 1}

§ 4. Consideration.

(4) Con-
sideration.

I have stated that consideration is the universal requisite of contracts not under seal, and this is true of all contracts, even when the law has prescribed a form in which they should be expressed, so long as the form is not that of a deed. There are exceptions to this rule, but they are of so marked and limited a character as not to detract from the generality of the principle upon which the rule is based.

Considera-
tion de-
fined.

Consideration has been thus defined in the case of *Currie v. Misa* : —

'A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.'

L. R.
10 Exch. 162.

Consideration therefore is something done, forborne, or suffered, or promised to be done, forborne, or suffered by the promisee in respect of the promise. It must necessarily be *in respect of the promise*, since consideration gives to the promise a binding force.²

1 Q. B. D.
127.
8 App. Ca.
488.

^a See the opinions expressed by Brett, L.J., in *Britain v. Rossiter* and by Lord Blackburn in *Maddison v. Alderson*.

¹ *Bird v. Munroe*, 66 Me. 337, H. & W. 92; *Townsend v. Hargraves*, 118 Mass. 325.

² "A benefit to the party promising, or a loss to the party to whom the promise is made." *Cook v. Bradley*, 7 Conn. 57, H. & W. 133.

We may now lay down some general rules as to consideration : —

*1. It is necessary to the validity of every promise [*75] not under seal.

2. It need not be adequate to the promise, but must be of some value in the eye of the law.

3. It must be legal.

4. It must be either present or future, it must not be past.

1. *Consideration is necessary to the validity of every simple contract.*¹ (i) **Necessity of consideration.**

Supra, p. 48.

The case of *Pillans v. Van 'Mierop* would seem to show that the rule which I have laid down was not so formulated as to cover all cases of simple contract in the year 1765.

Lord Mansfield held that consideration was only one of several modes for supplying evidence of the promisor's intention to bind himself; and that if the terms of a contract were reduced to writing by reason of commercial custom, or in obedience to statutory requirement, such evidence dispensed with the need of consideration. The question arose again in 1778. In *Rann v. Hughes*, Mrs. Hughes, administratrix of an estate, promised in writing to pay out of her own pocket money due from the estate to the plaintiff. There was no consideration for the promise, and it was contended that the observance of the form required by 29 Car. II. c. 3. § 4 made consideration unnecessary. The case went to the House of Lords. The opinion of the judges was taken, and was thus delivered by Skynner, C.B.: —

7 T. R.
350 (n).

‘It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration. Such an agreement is “nudum pactum ex quo non oritur actio;” and whatso-

¹ *Cook v. Bradley*, supra; *Burnet v. Bisco*, 4 Johns. (N. Y.) 235; *Conover v. Stillwell*, 34 N. J. L. 54; *Hess's Estate*, 150 Pa. St. 346.

ever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. . . . All contracts are by the law of England divided into agreements by specialty and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain as contracts in writing. If they be merely written and not specialties, they are parol and a consideration must be proved.'¹

Excep-
tions to
general
rule.

*I have said that there are a few exceptions to the universality of this rule. They are two. [*76]

See pp. 88-4.

(1) The promise of a gratuitous service, although not enforceable as a promise, involves a liability to use ordinary care and skill in performance.

See Part III.
ch. ii. § 1.

(2) In dealings arising out of negotiable instruments, such as bills of exchange and promissory notes, a promise to pay money may be enforced though the promisor gets nothing and the promisee gives nothing in respect of the promise.

These two exceptions represent legal obligations recognized in the courts before the doctrine of consideration was clearly formulated; they were engrafted upon the common law, in the first case from the historical antecedents of contract, in the second from the law merchant. It is better to recognize these exceptions, to define them and to note their origin, than to apply the doctrine of consideration by forced and artificial reasoning to legal relations which grew up outside it.

(ii) Ade-
quacy of
considera-
tion :

2. *Consideration need not be adequate to the promise, but must be of some value in the eye of the law.*²

Courts of law will not make bargains for the parties to

¹ A written unsealed contract (except it be negotiable) stands upon no different footing from a parol contract so far as concerns consideration. A negotiable instrument has a presumption of consideration, which, however, may be rebutted as between the parties. *Townsend v. Derby*, 3 Met. (Mass.) 363; *Williams v. Forbes*, 114 Ill. 167. By statute in some of the States a like effect is given to all written instruments. Stinson, Am. St. Law, § 4121.

² *Brooks v. Ball*, 18 Johns. (N. Y.) 337; *Devecmon v. Shaw*, 69 Md. 199, H. & W. 141; *Worth v. Case*, 42 N. Y. 362; *Hamer v. Sidway*, 124

a suit, and, if a man gets what he has contracted for, will not inquire whether it was an equivalent to the promise which he gave in return. The consideration may be a benefit to the promisor, or to a third party, or may be of no apparent benefit to anybody, but merely a detriment to the promisee: in any case 'its adequacy is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced.'

Per Blackburn, J.,
Bolton v. Madden,
L. R. 9 Q. B. 55.

The following case will illustrate the rule.

Bainbridge owned two boilers, and at the request of Firmstone allowed him to weigh them on the terms that they were restored in as good a condition as they were lent. Firmstone took the boilers to pieces in order to weigh them and returned them in this state, and for breach of his promise Bainbridge sued him. It was argued that Bainbridge suffered *no detriment, nor

Bainbridge v. Firmstone, 8 A. & E. 743.

not regarded by the courts,

[*77] did Firmstone get any benefit by the permission to weigh the boilers, and that there was no consideration for the promise to restore them in good condition. But the defendant was held liable.

'The consideration is that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit: at any rate there is a detriment to the plaintiff from his parting with the possession for ever so short a time.'

In *Haigh v. Brooks*, where the consideration for a promise to pay certain bills of a large amount was the surrender of a document supposed to be a guarantee, which turned out to be unenforceable, the worthlessness of the document surrendered was held to be no defence to an action on the promise. 'The plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant *obtained what he desired by means of that promise.*'

10 A. & E. 803.

except in
granting
equitable
remedies.

Equity treats inadequacy of consideration as corroborative evidence of fraud or undue influence, such as may enable a promisor to resist a suit for specific performance, or get his promise cancelled, in the Chancery Division of the High Court. But mere inadequacy of consideration, unless, in the words of Lord Eldon, it is so gross as 'to shock the conscience and amount in itself to conclusive evidence of fraud,' is not of itself a ground on which specific performance of a contract will be refused.¹

Coles v.
Trecothick,
9 Ves. 234.

**Reality of
considera-
tion.**

Though consideration need not be adequate it must be real. This leads us to ask what is meant by saying that consideration must be 'something of some value in the eye of the law.'

L. R. 10.
Exch. 182.

I have said that the definition of consideration, supplied by the Court of Exchequer Chamber in *Currie v. Misa*, amounts to this — that consideration is something done, forborne, or suffered, or promised to be done, forborne, or suffered, by the promisee in respect of the promise. It is therefore of two kinds, (1) a present act, forbearance, or sufferance, *constituting either the offer or the acceptance of one of the parties, and being all that can be [*78] required of him under the contract; or (2) a promise to do, forbear, or suffer, given in return for a like promise. In the first case the consideration is present or executed, in the second it is future or executory.²

**Forms of
considera-
tion.**

The offer of a reward for information, accepted by the supply of the information required; the offer of goods, accepted by their use or consumption, are illustrations of executed consideration. Mutual promises to marry; a promise to do work in return for a promise of payment, are illustrations of executory consideration.

The fact that the promise given for a promise may be dependent upon a condition does not affect its validity as

¹ *Erwin v. Parham*, 12 How. (U. S.) 197; *Ready v. Noakes*, 29 N. J. Eq. 497; *Hall v. Perkins*, 3 Wend. (N. Y.) 626, H. & W. 311.

² *Funk v. Hough*, 29 Ill. 145.

a consideration. *A* promises *X* to do a piece of work for which *X* promises to pay if the workmanship is approved by *M*. The promise of *X* is consideration for the promise of *A*.¹

When an action is brought upon a promise we have to ask: — Tests of reality.

(a) Did the promisee do, forbear, suffer, or promise *anything* in respect of his promise?

(b) Was his act, forbearance, sufferance, or promise of any ascertainable value?

(c) Was it more than he was already legally bound to do, forbear, or suffer?

(a) Apart from the view entertained by Lord Mansfield as to the substitution of writing for consideration as evidence of the intention of the parties in commercial contracts, we find cases in comparatively modern times which have raised a doubt whether consideration, under certain circumstances, is necessary to make a promise actionable. (a) First test of reality.

The cases have resulted in the establishment of two rules: —

Motive is not the same thing as consideration.

Consideration must move from the promisee.

Motive must be distinguished from consideration.

In *Thomas v. Thomas*, a widow sued her husband's executor 2 Q. B. 851.
[*79] for breach of an agreement to allow her to occupy a house, which had been the property of her husband, on payment of a small portion of the ground-rent. It appeared at the trial that the executor in making the agreement was carrying out a wish expressed by the deceased that his wife should have the use of the house. The court held that a desire on the part of an executor to carry out the wishes of the deceased would not amount to a consideration. *'Motive is not the same thing with consideration.'* Motive and consideration.

¹ *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, H. & W. 546; *Ray v. Thompson*, 12 Cush. (Mass.) 281, H. & W. 534.

Consideration means something of some value in the eye of the law, moving from the plaintiff.' But it was further held that the undertaking to pay ground-rent by the plaintiff was a consideration for the defendant's promise, and that the agreement was binding.¹

The confusion of motive and consideration has appeared in other ways.

good con-
sideration,

The distinction between *good* and *valuable* consideration, or family affection as opposed to money value, is only to be found in the history of the law of real property.² Motive has most often figured as consideration in the form of a moral obligation to repay benefits received in the past. It is clear that the desire to repay or reward a benefactor is indistinguishable, for our purposes, from a desire on the part of an executor to carry out the wishes of a deceased friend, or a desire on the part of a father to pay the debts of his son. The mere satisfaction of such a desire, unaccompanied by any present or future benefit accruing to the promisor or any detriment to the promisee, cannot be regarded as of any value in the eye of the law.³

Mortimore
v. Wright,
6 M. & W.
482.

past con-
sideration,

At the end of the last and beginning of the present century, the moral obligation to make a return for past benefits had obtained currency in judicial language as an equivalent to consideration. The topic belongs to the discussion of past as distinguished from executed or present consideration, but it is well here to insist on the truth that past consideration is no consideration, and that what the promisor gets in such a case is the satisfaction of

¹ *Schnell v. Nell*, 17 Ind. 29, H. & W. 138.

² *Fink v. Cox*, 18 Johns. (N. Y.) 145; *Stovall v. Barnett*, 4 Littell (Ky.), 208.

³ *Cook v. Bradley*, 7 Conn. 57, H. & W. 133; *Mills v. Wyman*, 3 Pick. (Mass.) 207, H. & W. 201. In a few States by statute and in some by judicial decision a strong moral obligation will support a promise. *Gray v. Hamil*, 82 Ga. 375; *Robinson v. Hurst*, 78 Md. 59; *Holden v. Banes*, 140 Pa. St. 63. And see the reasoning in *Edwards v. Nelson*, 51 Mich. 121.

[*80] motives of pride or gratitude. The *question was settled once for all in *Eastwood v. Kenyon*, and a final blow given to the doctrine that past benefits would support a subsequent promise on the ground of the moral obligation resting on the promisor. 'The doctrine,' says Lord Denman, 'would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.'

11 A. & E.
488.

Consideration must move from the promisee.

It has been argued that where two persons make a contract in which one of them promises to confer benefits upon a third party, the third party can sue upon the contract for the money or other benefit which it is agreed that he should receive.

Consideration moving from stranger.

The matter concerns mainly the operation of contract, but it is plain that if such a contention were well founded, a man could sue on a promise not made to him, nor supported by any consideration which he had furnished.

Part III.
ch. i. § 2.

It was at one time held that where *A* made a binding promise to *X* to do something for the benefit of the son or daughter of *X*, the nearness of relationship, and the fact that the contract was prompted by natural affection, would give a right of action to the person interested.

Dutton v.
Poole, 2 Lev.
210.

This however is no longer law. 'It is now established that no stranger to the consideration can take advantage of a contract, though made for his benefit.'^a 1

Tweddle v.
Atkinson.
1 B. & S. 398.

So we may say that a promisor cannot be sued on his promise if he made it merely to satisfy a motive or wish,

^a As to the effect of a promise which amounts to a declaration of trust, see Part III. ch. i. § 2.

¹ "The right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country." Mr. Justice Davis in *Hendrick v. Lindsay*, 93 U. S. 143, 149. See H. & W. Cases, pp. 420-437 and notes.

nor can he be sued on it by one who did not furnish the consideration on which the promise is based.

(b) Second
test of
reality.

(a) *Primâ
facie*
impossi-
bility.

(b) We now come to the class of cases in which the consideration turns out to be of no ascertainable value.

Physical or legal impossibility, obvious upon the face of the contract, makes the consideration unreal. The impossibility must be *obvious*, for if it is only a practical impossibility such *as would arise from the death or [*81] destruction of the subject-matter of the contract, it would have a different effect. If existing, unknown to the parties when the promise was made, it might avoid the contract on the ground of mistake. If arising subsequent to the contract, it might under certain circumstances be a ground of discharge.

Physical

But a promise to pay money in consideration of a promise to discover treasure by magic, to go round the world in a week, or to supply the promisor with a live pterodactyl, would be void for unreality in the consideration furnished.

or legal.

And an old case furnishes us with an instance of a legal impossibility. A bailiff was promised £40 in consideration of a promise made by him that he would discharge a debt due to his master. The court held that the bailiff could not sue; that the consideration furnished by him was 'illegal,' for the servant cannot discharge a debt due to his master. By 'illegal' it is plain that the court meant legally impossible.¹

Harvey v.
Gibbons,
2 Lev. 161.

Again, a promise which purports to be a consideration may be of too vague and unsubstantial a character to be enforced.

(a) Un-
certainty.

A son gave a promissory note to his father: the father's executors sued him upon the note, and he alleged that his

¹ *Beebe v. Johnson*, 19 Wend. (N. Y.) 500, H. & W. 152; (cf. *Adams v. Messinger*, 147 Mass. 185, H. & W. 613); *Stevens v. Coon*, 1 Pinney (Wis.) 356, H. & W. 155; *Merrill v. Packer*, 80 Ia. 542, H. & W. 339 n.

father had promised to discharge him from liability in consideration of a promise on his part that he would cease from complaining, as he had been used to do, that he had not enjoyed as many advantages as his brothers. It was said that the son's promise was no more than a promise 'not to bore his father,' and was too vague to form a consideration for the father's promise to waive his rights on the note.¹

White v. Bluet, 23 L. J. Exch. 86.

So too promises to pay such remuneration *as shall be deemed right*; to retire from the practice of a trade *so far as the law allows*, have been held to throw upon the courts a responsibility of interpretation which they were not prepared to assume.²

Taylor v. Brewer, 1 M. & S. 290.

Davies v. Davies, 36 Ch. D. 359.

There are cases in which it is difficult to determine whether the consideration is real or not. A good illustration of such *cases is furnished by promises of [*82] forbearance to exercise a right of action, or agreements to compromise a suit.

In *Jones v. Ashburnham* action was brought on a promise to pay the plaintiff a sum of money in consideration of his forbearance to sue for a debt alleged to be due to him from a third party deceased. The pleadings did not state that there were representatives of the estate of the deceased towards whom this forbearance was exercised, or assets out of which the claim might be paid. It was held that such a forbearance was no consideration for a promise made in respect of it. 'How,' said Lord Ellenborough, 'does the plaintiff show any damage to himself by forbearing to sue, when there was no fund which could be the object of suit, where it does not appear that any person *in rerum natura* was liable to him?'

4 East, 455.

(γ) Forbearance to sue.

But where there is a definite person against whom a

Extent of forbearance.

¹ *Sherman v. Kitsmiller*, 17 Serg. & Rawle (Pa.), 45, H. & W. 157. Cf. *Long v. Battle Creek*, 39 Mich. 323.

² *Fairplay School Tp. v. O'Neill*, 127 Ind. 95. But that is certain which can be rendered certain. *Caldwell v. School Dist.*, 55 Fed. Rep. 372.

right of action exists, forbearance to sue, for however short a time, has been held to be consideration for an assignment or a promise to assign documents of title to goods.¹

2 Q. B. D.
386

In *Leask v. Scott* the consignee of a cargo obtained an advance of money on a promise to give security for the advance. Shortly after this he assigned a bill of lading of the cargo among other securities for the advance made. It was argued that the consideration for this assignment was past, and so unreal, but the Court of Appeal held that since action could have been brought at any time on the promise to give security, and was not brought, 'the consideration for the assignment of the bill of lading was a forbearance to sue for an indefinite and unspecified time.' The assignment '*stayed the hand of the creditor.*'^a

2 Dr. & Sm.
259.

*In the *Alliance Bank v. Broom*, Mr. Broom being largely indebted to the bank was asked to give security for his debt. He promised to assign warrants for the delivery of certain goods, afterwards failed to do so, and the bank sought specific performance of the promise. It was argued that the existence of the debt was no consideration to support the agreement, but the court held, that though there was no promise on the part of the bank not to sue for the debt, 'yet the effect was that the bank did give, and Broom received the benefit of' [*83]

^a This case is a good illustration of forbearance as a consideration, but it is not free from difficulty of another sort. If the creditor was entitled to an immediate performance of the promise to give cover, the debtor, in indorsing to him the bill of lading, did no more than he was legally bound to do. Then there was no consideration for the forbearance, and the whole contract seems to fall to pieces.

The indorsement was in truth a part performance of a promise to give cover, which promise was made in consideration of an advance. There really seems to have been no need to build up a new contract out of the indorsement and the forbearance.

¹ *Pennsylvania Coal Co. v. Blake*, 85 N. Y. 226, H. & W. 162; *Foster v. Metts*, 55 Miss. 77, H. & W. 164; *Mulholland v. Bartlett*, 74 Ill. 58; *Cline v. Templeton*, 78 Ky. 550; *Palfrey v. Portland R.*, 4 Allen (Mass.), 55.

some degree of forbearance, *not indeed for any definite time, but at all events some extent of forbearance.*'

The compromise of a suit is based upon the same consideration. A man may have no cause of action, but he may honestly think he has one, and mean to try and enforce it. If then the party threatened with legal proceedings, though he may know that he has a good defence, in order to escape the inconvenience and anxiety of litigation, makes a compromise, he will be bound by its terms.

But the plaintiff must believe that he has a case.

'It would be another matter,' said Cockburn, C.J., 'if a person made a claim which he knew to be unfounded, and by a compromise derived an advantage under it: in that case his conduct would be fraudulent.'

(s) Compromise of suit.

Callischer v. Bischoffsheim, L. R. 5 Q. B. 449.

So in *Wade v. Simeon*, where the plaintiff admitted on the pleadings that he knew his claim to be unfounded, the compromise was not held binding.¹

2 C.B. 548.

¹ *Russell v. Cook*, 3 Hill (N.Y.), 504, H. & W. 165; *Grandin v. Grandin*, 49 N. J. L. 508; *Good Fellows v. Campbell*, 17 R. I. 402; *Bellows v. Sowles* 57 Vt. 164, H. & W. 110.

It would seem that a compromise of a doubtful claim, (that is doubtful as to whether there is any claim or doubtful as to the amount of the claim,) should be distinguished from a forbearance to sue upon a claim of a definite amount. In forbearance the one forbearing simply postpones his suit; he does not agree to compromise on a smaller sum. In such a case it would seem that he must actually have a well-founded claim to forbear or the consideration is of no value. *Foster v. Metts*, *supra*; *Mulholland v. Bartlett*, *supra*. In compromise there is doubt, followed by mutual concession. The doubt may be as to whether there is any claim, and the plaintiff may agree to take less than the sum claimed and the defendant to pay something where he believes he owes nothing; or the doubt may be as to the amount due, and an amount somewhere between the two contended for may be agreed upon. In these cases it is enough if the plaintiff honestly believes that he has a well-founded claim, not because there is a real consideration, but because "the best interests of society require that such should be the effect." *Russell v. Cook*, *supra*. Many cases, however, seem to make no distinction between mere forbearance and compromise. *Hewett v. Currier*, 63 Wis. 386; *Parsons on Cont.* (8th ed.), iii. *441-2, note.

(c) Gratuitous
bailment.

In the contracts which arise from the gratuitous deposit of a chattel or from gratuitous employment, the consideration is not obvious. But the two cases are distinguishable.

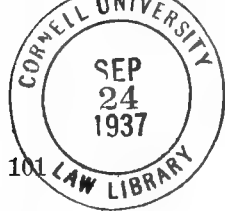
Where property is placed in the hands of a bailee or depositary, the mere parting with possession is detriment to the bailor, such as will support an implied promise by the bailee to use reasonable care in the custody of the property, or an *express promise to undertake services in respect of it. *A* allowed two bills of exchange to remain in the hands of *X*, and *X* promised to get the bills discounted and pay the money to *A*'s account; this promise was held to be made upon good consideration, namely, the permission given to *X* to retain the bills. [*84]

Hart v.
Miles,
4 C. B.,
N. S. 371.

Gratuitous
employment.

But where *A* employs *X* to render services to him gratuitously the case is different. When *X* enters upon the employment he is bound to use reasonable care in the execution of it: till he has entered into the employment there is no consideration for his promise to execute it, and neither party is bound. It might be possible to frame a binding contract, though no reward was to be given for the work done. A promise by *A* to *X*, that if *X* would undertake certain work *A* would employ no one else, might be a consideration for a promise by *X* to undertake the work, for the court would probably decline to ask what advantage *X* anticipated from the exclusive right to do certain work for *A*.

But this is not the case before us. There is no doubt that a mere request by *A* to *X* for services, assented to by *X*, creates a liability on the part of *X* to use due care when, *and not before*, the service is entered upon. *A* sued *X* for non-completion of a warehouse which *X* had undertaken to complete by a certain day: and also for having used new materials in the building instead of old materials which he was ordered to use as far as they would go. No consideration was alleged for the undertaking of *X*, and



the King's Bench held that he was *not* liable for the non-feasance or non-completion of the building, but that he *was* liable for the mis-feasance in that having entered on the employment he increased the cost of the work by using new materials instead of old. '*The defendant is bound in consequence of having entered on the work*, and whether the work were or were not to be performed for hire, *X* was not to injure *A*.'

Elsee v.
Gatward,
5 T. R. 143.

Again, *A* asked *X* to insure his house against fire, *X* undertook to do so, and effected the policy so carelessly that **A* could not recover upon it when his house [*85] was burned down. *X* was held liable in damages to *A*: but if he had not insured at all *A* would have had no remedy.^a Here is an agreement which when made gives no cause of action, but which is rendered actionable by performance; the employer is liable to indemnify the employed against loss or expense; the employed is liable if he fail to use reasonable care.^b

Wilkinson v.
Coverdale,
1 Esp. 75.

It is idle to say that the trust reposed in the person employed is the consideration for his promise to use reasonable care; for the promise becomes binding, not when it is made, but when performance has begun. Nor can we say that the liability arises *ex delicto*, for it springs from the undertaking or contract. The relation of the parties is nearer to that which was effected by the *mandatum* of Roman law; it is an anomaly in the English law of contract.¹

^a See on this point Hare on Contract, 158-161; Parsons on Contract, ii. 103, and the case of *Thorne v. Deas* in the Supreme Court of New York. 4 Johns. 84

^b *Wilkinson v. Coverdale* was decided at *nisi prius*, and the plaintiff ultimately failed to prove any promise by the defendant; but the case is the only one in which the point as to gratuitous employment is raised neatly; it is pretty fully set out in the note to *Coggs v. Bernard*, and is elsewhere cited with approval.

Smith, L. C
i. 220.

¹ *Thorne v. Deas*, 4 Johns. (N. Y.) 84, H. & W. 167; *McCauley v. Davidson*, 10 Minn. 418; *Melbourne &c. R. v. Louisville &c. R.*, 88 Ala. 443; *Preston v. Prather*, 137 U. S. 604; *Isham v. Post*, 141 N. Y. 100; *Swentzel v. Penn Bank*, 147 Pa. St. 140.

(c) Third
test of
reality.

(c) Does the promisee do, forbear, suffer, or promise more than that to which he is legally bound? If the promisor gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal.¹

(a, β) Per-
formance
of public
duty.

Collins v.
Godefroy,
1 B. & A.
950.

This may occur where the promisee is under a public duty to do that which he promises to do. Where a witness has received a subpoena to appear at a trial, a promise to pay him anything beyond his expenses, is based on no consideration, the witness is bound to appear and give evidence.²

England v.
Davidson,
11 A. & E.
856.

But a police-constable who sued for a reward offered for the supply of information, leading to a conviction, was held entitled to recover, since the services rendered were outside the scope of his ordinary duties.³

2 C. B. 548.

On the same principle a promise not to do what a man legally cannot do is an unreal consideration. The case of **Wade v. Simeon*, cited in discussing forbearance as a consideration, is a sufficient illustration of this point.⁴ [*86]

(γ) Prom-
ise to per-
form exist-
ing con-
tract.

Again, we find unreality of consideration where the promisee undertakes to fulfil the conditions of an existing contract.⁵

¹ *Tolhurst v. Powers*, 133 N. Y. 460, H. & W. 174; *Smith v. Whildin*, 10 Pa. St. 39, H. & W. 176.

² *Dodge v. Stiles*, 26 Conn. 463.

³ *Harris v. More*, 70 Cal. 502; *McCandless v. Allegheny Bessemer Steel Co.*, 152 Pa. St. 139.

⁴ *Tolhurst v. Powers*, *supra*; *McCaleb v. Price*, 12 Ala. 753.

⁵ Where *A* and *B* have a contract which *A* refuses to perform, and *B* promises *A* an additional sum to perform it, there are these possible views of the situation: (1) That *B*'s promise is without consideration in that he is simply doing what he was already bound to do. *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578, H. & W. 181. (2) That *A* has an election to perform the existing contract or abandon it and pay damages, and that his giving up of this election furnishes a consideration for the new promise. *Munroe v. Perkins*, 9 Pick. (Mass.) 298; *Connelly v. Devoe*, 37 Conn. 570. (3) That the forming of the new contract is conclusive evidence that the parties have mutu-

In the course of a voyage from London to the Baltic and back two seamen deserted, and the captain, being unable to supply their place, promised the rest of the crew that if they would work the vessel home the wages of the two deserters should be divided amongst them. This promise was held not to be binding.

'The agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. . . . The desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to bring the ship in safety to her destined port.'

Stilk v. Myrick, 2 Camp. 317.

Here again it would have been otherwise if risks had arisen which were not contemplated in the contract. Such a contract as that which the seamen had entered into in the case just cited contains an implied condition that the ship should be seaworthy. So where a seaman had signed articles of agreement to help navigate a vessel home from the Falkland Isles, and the vessel proved to be unseaworthy, a promise of extra reward to induce him to abide by his contract was held to be binding.

Hartley v. Ponsonby, 7 E. & B. 872.

Turner v. Owen, 3 F. & F. 176.

The actual performance of that which a man is legally bound to do, stands on the same footing as his promise to do that which he is legally compellable to do.^a The rule seems a logical deduction from the doctrine of consideration, but some applications of it have met with severe criticism.

(d) Performance of existing contract.

^a The difficulty suggested rather than raised by the case of *Synge v. Synge* has been touched upon in a note to p. 15.

[1894] 1 Q. B. 466.

ally agreed to rescind the old one, and the new contract therefore stands as if no previous one had been made. *Coyner v. Lynde*, 10 Ind. 282, H. & W. 177; *Stewart v. Keteltas*, 36 N. Y. 388. (4) That the new contract is to be treated as independent of the old one, and as an effort on the part of *B* to mitigate the damage he has suffered from the breach of the first. This would give validity to both contracts. *A* could sue on *B*'s promise contained in the second; *B* could sue on *A*'s promise contained in the first. *Endriss v. Belle Isle Co.*, 49 Mich. 229, H. & W. 180.

The payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt.^a It is in fact doing no more than *a man is already bound to do, and it is no consideration for a promise, express or implied, [*87] to forego the residue of the debt. There must be something different to that which the recipient is entitled to demand, in the thing done or given, in order to support his promise. The difference must be real, but the fact that it is slight will not destroy its efficacy in constituting a consideration, for if the courts were to say that the thing done in return for a promise was not sufficiently unlike that to which the promisor was already bound, they would in fact be determining the adequacy of the consideration. Thus, the giving a negotiable instrument for a money debt, or 'the gift of a horse, a hawk or a robe, in satisfaction, is good. For it shall be intended that a horse, a hawk or a robe might be more beneficial to the plaintiff than money, in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction.'¹

What
is done
must be
different:

Pinnel's
case, 5 Co.
Rep. 117.

else no
considera-
tion for
the prom-
ise to
forego.

It would seem plain that if a man wishes to make a binding promise, otherwise than under seal, to forego legal rights, such a promise must needs depend for its validity upon the rules common to all promises. But we should look at a promise of this sort when it is made before, or again when it is made after, the contract is broken: for the general rule is subject to some variations of detail in the two cases.

Contract
executory.

If a contract is wholly executory, and the liabilities of both parties as yet unfulfilled, it can be discharged by mutual consent, the acquittance of each from the other's

1 Sm. L. C.
366. ed. 9.

^a It is strange that this rule should still be spoken of as the rule in *Cumber v. Wane*. In that case it was held that a promissory note for £5 was no satisfaction for a debt of £15, not because there was no consideration (for a negotiable instrument was given for a debt) but because the satisfaction was inadequate. Such a decision would hardly be supported now (see editor's note to the case at p. 373).

¹ *Jaffray v. Davis*, 124 N. Y. 164, H. & W. 187.

claims being the consideration for the promise of each to waive his own.¹

A contract in which *A*, one of the parties, has done his part, and *X*, the other, remains liable, cannot (except in the case of bills of exchange or promissory notes) be discharged by mere consent, but it may be discharged by the substitution of a new agreement. *A* has supplied *X* with goods according to ^[*88] a contract. *X* owes *A* the price of the goods. If *A* waives his claim for the money, where is the consideration for his promise to waive it? If *A* and *X* substitute a new agreement, to the effect that *X* on paying half the price shall be exonerated from paying the remainder, where is the consideration for *A*'s promise to forego the payment of half the sum due to him? The new agreement needs consideration: there must be some benefit to *A* or detriment to *X* in return for *A*'s promise. Detriment to *X* there can be none in paying half of a sum the whole of which he may at any time be compelled to pay; and benefit to *A* there can be none in receiving a portion of a sum the payment of which he can at any time compel. Unless *A* receives something different in kind, a chattel, or a negotiable instrument, or a fixed for an uncertain sum, his promise is gratuitous and must be made under seal.²

Contract
executed.

Foster v.
Dawber,
6 Ex. 889.
See Part V.
ch. i.

Goddard v.
O'Brien,
9 Q. B. D. 37.

We now come to cases where the contract is broken and a promise made to forego the right arising from the breach.

Contract
broken:

Where the right itself is in dispute the suit may be compromised as already described.³

right in
dispute.

Where the right is undisputed, the amount due may be uncertain or certain.

Right
admitted:

¹ *Cutter v. Cochrane*, 116 Mass. 408.

² *Collyer v. Moulton*, 9 R. I. 90, H. & W. 522; *Bender v. Been*, 78 Iowa, 283, H. & W. 87.

³ *Russell v. Cook*, 3 Hill (N. Y.), 504, H. & W. 165. See also *Alden v. Thurber*, 149 Mass. 271, H. & W. 630.

damages
uncertain.
Wilkinson
v. Byers,
1 A. & E. 106.

Right
admitted:
damages
certain.

If it is uncertain, the payment of a liquidated or certain sum would be consideration for foregoing a claim for a larger though uncertain amount.¹

If it is certain, the promise to forego the claim or any portion of it can only be supported by the giving of something different in kind, or by a payment at an earlier date or in different manner to that agreed on.²

And whether the sum due is of certain or uncertain amount the consideration for the promise to forego must be *executed*. The parties must not only have agreed, but their agreement must be carried out if it is to be an answer to the original cause of action. Where it has been carried out it is an *accord and satisfaction*, where it has not been carried out it is an *accord executory*. As is said in an old case, '*accord executed* is *satisfaction: *accord execu-* [^{*89}]
tory is only substituting one cause of action in the room of another, which might go on to any extent.'³

Lynn v.
Bruce,
2 H. Bl. 819.

Some denunciation and some ridicule have been expended on the rule that the payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt. And yet, as was said in a judgment in which the House of Lords recently affirmed the rule, 'it is not really unreasonable, or practically inconvenient, that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation.'

Ponkes v.
Beer, 9 App.
Ca. 605.

There seems to be no difference between a promise by A to X to give him £45 on demand, and a promise by A to X to excuse him £45 out of £50 then due. If consideration is needed in the one case, it is needed in the other, and there can be no reason why the law should favour a man who is excused money which he ought to

¹ *Bellows v. Sowles*, 57 Vt. 164, H. & W. 110.

² *Jaffray v. Davis*, 124 N. Y. 164, H. & W. 187; *Kidder v. Kidder*, 33 Pa. St. 268, H. & W. 625; *Perkins v. Lockwood*, 100 Mass. 249, H. & W. 197.

³ *Kromer v. Heim*, 75 N. Y. 574, H. & W. 627.

pay, more than a man who is promised money which he has not earned.¹

A composition with creditors appears at first sight to be an infraction of the rule, inasmuch as each creditor undertakes to accept a less sum than is due to him in satisfaction of a greater. But the promise to pay, or the payment of a portion of the debt, is not the consideration upon which the creditor renounces the residue. That this is so is apparent from the case of *Fitch v. Sutton*. There the defendant, a debtor, compounded with his creditors and paid them 7s. in the pound; he promised the plaintiff, who was one of the creditors, that he would pay him the residue when he could; but the plaintiff nevertheless gave him a receipt of all claims which he might have against him 'from the beginning of the world to that day.' The plaintiff subsequently brought an action for the residue of his claim; the defendant pleaded the acceptance of 7s. in the pound in full of all demands: but this was held to be no answer to the plaintiff's claim.

(*) Composition with creditors.

5 East, 230.

'It is impossible,' said Lord Ellenborough, 'to contend that acceptance of £17 10s. is an extinguishment of a debt of £50. [*90] *There must be some consideration for a relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*.'

The consideration in a composition with creditors must therefore be something other than the mere acceptance of a smaller sum in satisfaction of a larger: it is the substitution of a new agreement with new parties and a new consideration.

Consideration for composition is a new agreement.

The common law on this point (apart from the various bankruptcy acts) was settled in the case of *Good v. Cheesman*. There the defendant, a debtor who had compounded with his creditors, set up as against an individual creditor suing for the whole of his debt, not a separate promise by

2 B. & Ad. 325.

¹ Care should be taken to distinguish a contract to release a debtor from a gift of the debt to the debtor. *Gray v. Barton*, 55 N. Y. 68.

that creditor to forego the residue, but a composition made with all the creditors. The composition was held to be a good defence to the action, and the consideration which supported each creditor's promise to accept a lesser sum in satisfaction of a greater was thus stated by Parke, J.: — 'Here each creditor entered into a new agreement with the defendant (the debtor), the consideration of which, to the creditor, was a forbearance by all the other creditors, who were parties, to insist upon their claims.' It is not the payment of a portion of the debt, which forms the consideration in the case of a composition with creditors, but the substitution of a new agreement with different parties for a previous debt.

Good v.
Cheesman,
2 B. & Ad.
335.

Boyd v.
Hind, 1 H. &
N. 938.
Slater v.
Jones, L. R.
8 Ex. at
1. 193.

The composition with creditors is therefore no exception to the general rule, inasmuch as the debtor not only pays the creditor a portion of the sum due, but procures a promise by each of his other creditors, or by a certain number of them, that each will be content with a similar proportionate payment if the others will forbear to ask for more. And creditor *X* not merely gets payment of 10s. in the pound from his debtor *A*, but a promise from creditors *Y* and *Z* that they too will be content with a payment of 10s. in the pound.¹

¹ There are several possible views of the grounds for enforcing a composition with creditors. (1) That the consideration moves from the debtor, and consists in his procuring the promises of the other creditors. This is the view of the author. It is open to the objection that it is not always the case that the debtor procures these promises. The composition would be equally binding if the creditors first agreed among themselves and the debtor accepted their offer. (2) That the creditors mutually promise each other for the benefit of the debtor, the consideration moving from each creditor and consisting in the detriment he suffers in taking less than he is entitled to, relying on the promises of the other creditors to do the same. This view could not be pressed in jurisdictions where a stranger to the consideration can not enforce the promise. Wharton on Cont., § 527; Bishop on Cont., § 55. (3) That the promises are enforced on the ground of estoppel, since it would be a fraud on the other creditors to permit one to recover more than he has agreed to take when they have taken less

It is not difficult to see that consideration is unreal if it consist in a promise given to perform a public duty or a contract already made with the promisor. It is [91] harder to answer the question whether the performance or promise to perform an existing contract with a third party is a real consideration.

(§) Promise to perform contract with third party.

We must note two cases dealing with this form of consideration.

In *Shadwell v. Shadwell* the plaintiff had promised to marry X: his uncle promised him in writing that if he married X he should receive £150 a year during the uncle's lifetime. He married X; the annuity fell into arrear; the uncle died, and the plaintiff sued his executors. The court differed as to the existence of a consideration for the uncle's promise. Erle, C.J., and Keating, J., inclined to regard it as the offer of a promise capable of becoming a binding contract when the marriage took place. Byles, J., dis-

9 C. B., N. S. 159.

than they are entitled to, relying on his promise to do the same. Metcalf on Cont., p. 192. Sometimes one, and often all, of these reasons are assigned. *Perkins v. Lockwood*, 100 Mass. 249, H. & W. 197; *Williams v. Carrington*, 1 Hilt. (N. Y.) 515, H. & W. 195; *Murray v. Snow*, 37 Iowa, 410.

Analogous to this question is the one as to the enforceability of mutual promises to subscribe money to a charitable object. Several views are taken of this subject. (1) That the subscription is an offer which becomes a contract by acceptance only when the trustees of the charity have entered upon the performance of the work contemplated in the subscription. Up to that time the subscription may be revoked, and is revoked, by the death of the subscriber. *Pratt v. Trustees*, 93 Ill. 475, H. & W. 35; *Twenty-third Street Bp. Ch. v. Cornell*, 117 N. Y. 601; *Cottage St. Ch. v. Kendall*, 121 Mass. 528; *University of Des Moines v. Livingstone*, 57 Iowa, 307. (2) That the promises of the subscribers mutually support each other. This view implies that a stranger to the consideration may enforce the promise. *Lathrop v. Knapp*, 27 Wis. 214; *Higert v. Indiana Asbury Univ.*, 53 Ind. 326; *Christian College v. Hendley*, 49 Cal. 347; *Edinboro Acad. v. Robinson*, 37 Pa. St. 210. (3) That the acceptance by the trustees of the charity of the subscription implies a promise on their part to execute the work contemplated, and that these promises support each other. *Trustees v. Haskell*, 73 Me. 140; *Collier v. Baptist Ed. Soc.*, 8 B. Mon. (Ky.) 68; *Helfenstein's Estate*, 77 Pa. St. 328.

sented, holding that the plaintiff had done no more than he was legally bound to do, and that his marriage was therefore no consideration for the uncle's promise.

6 H. & N.
295.

In *Scotson v. Pegg*, Scotson promised to deliver to Pegg a cargo of coal then on board a ship belonging to Scotson, and Pegg promised in return to unload it at a certain rate of speed. This he failed to do, and when sued for breach of his promise, pleaded that Scotson was under contract to deliver the coals to *X* or to *X*'s order, and that *X* had made an order in favour of Pegg. Scotson therefore in promising to deliver the coals promised no more than he was bound to perform under his contract with *X*, and Pegg alleged that there was no consideration for his promise to unload speedily.

Difficulties presented by *Shadwell v. Shadwell* and *Scotson v. Pegg*.

The court held that Pegg was liable, since it was not inconsistent with the pleadings that there might have been some dispute as to Pegg's right to the coals, or some claim upon them foregone by Scotson: but Wilde, B., said, 'If a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding.'

In both these cases the decisions are reconcileable with the *doctrine of consideration, but not the *dicta* on which the decisions rest. [*92]

In *Shadwell v. Shadwell* the original contract was executory; the nephew and *M*, to whom he was engaged, might have put an end to it by a mutual waiver of their respective promises. The nephew, at the request of his uncle, abandoned, or agreed to abandon, a right which he might have exercised in concurrence with *M*; and the abandonment of a right has always been held to be consideration for a promise.

In *Scotson v. Pegg* the court clearly thought that the promise to deliver coals to the defendant might have been something more than a mere performance of an existing

promise to a third party; that there might have been a right waived or claim foregone which did not appear on the pleadings. So far the decisions are consistent with principle, but there are *dicta* which seem to show that two judges in the first case, and Baron Wilde in the second, thought that a promise given in consideration of the performance or promise to perform a contract with a third party was binding.

Whether the promise is conditional on the performance of the contract made with the third party, or whether it is given in return for a promise to perform, does not seem to make any difference in principle. If we say that the consideration is the detriment to the promisee in exposing himself to two suits instead of one for the breach of contract we beg the question, for we assume that an action would lie on such a promise. If we say that the consideration is the fulfilment of the promisor's desire to see the contract carried out, we seem to confound motive and consideration.

The decisions consistent with principle.

At least, one may say that on principle the performance or promise to perform an outstanding contract with a third party is not of itself consideration for a promise, and that the practical result of the cases is not inconsistent with this rule.¹

3. *Consideration must be legal.*

This rule should be mentioned here, but we must deal with

(iii) Legality of consideration.

*it later when the time comes to consider, as an element in the formation of contract, the legality of the

[*93]

¹ The decisions in this country clearly hold that the promise to perform an existing contract with a third person, or the performance of it, does not constitute a valuable consideration. *Johnson's Adm'r v. Sellers' Adm'r*, 33 Ala. 265, H. & W. 185; *Schuler v. Myton*, 48 Kans. 282; *Gordon v. Gordon*, 56 N. H. 170; *Robinson v. Jewett*, 116 N. Y. 40; *Davenport v. First Cong. Soc.*, 33 Wis. 387; *Brownlee v. Lowe*, 117 Ind. 420; *Merrick v. Giddings*, 1 Mackey (D. C.), 394.

objects which the parties have in view when they enter into a contract.¹

(iv) **Past consideration.**

4. *Consideration may be executory or executed, it must not be past.*

General rule.

Consideration executory, executed,

We now come to deal with the relation of the consideration to the promise in respect of time. The consideration for a promise may be *executory*, and then it is a promise given for a promise; or it may be *executed*, and then it is an act or forbearance given for a promise, the act or forbearance constituting at once the proposal or acceptance and the consideration for the promise given in respect of it; or it may be *past*, and then it is a mere sentiment of gratitude or honour prompting a return for benefits received; in other words, it is no consideration at all.

and past.

Executory consideration:

ante, p. 76.

As to *executory* considerations, nothing remains to be added to what has been said already. I have shown that a promise on one side is good consideration for a promise on the other.

Executed consideration.

Leake on Contracts, p. 36, ed. 3.

Ante, pp. 12-14.

A contract arises upon executed consideration when one of the two parties has, either in the act which constitutes an offer or the act which constitutes an acceptance, done all that he is bound to do under the contract, leaving an outstanding liability on one side only. These two forms of consideration are described by Mr. Leake as 'acceptance of an executed consideration,' and 'consideration executed upon request': corresponding to the offer of an act for a promise, and the offer of a promise for an act.

Offer of an act for a promise.

In the first case a man offers his labour or goods under such circumstances that he obviously expects to be paid for them; the contract arises when the labour or goods are accepted by the person to whom they are offered, and he by his acceptance becomes bound to pay a reasonable price for them. 'If I take up wares from a tradesman without

¹ *Boigneres v. Boulon*, 54 Cal. 146, H. & W. 357. See H. & W. Cases, pp. 315-372.

any agreement of price, the law concludes that I contracted to pay their real value.' So in *Hart v. Mills* the defendant had *ordered four dozen of wine and the plaintiff [*94] sent eight, the defendant retained thirteen bottles and sent back the rest, and the plaintiff sued him on the original contract for the purchase of four dozen. It was held that the retention of thirteen bottles was not an acquiescence in the misperformance of the original contract, but a new contract arising upon the acceptance of goods tendered, and that the plaintiff could only recover for thirteen bottles. 'The defendant orders two dozen of each wine and you send four: then he had a right to send back all; he sends back part. *What is it but a new contract as to the part he keeps?*'¹

Per Tindal, C. J., in *Hoadley v. McLaine*, 10 Bing. 482.

Hart v. Mills, 15 M. & W. 87.

It must, however, be borne in mind that where the person to whom such an offer is made has no opportunity of accepting or rejecting the things offered, an acceptance which he cannot help will not bind him. The case of *Taylor v. Laird*, already cited, illustrates this proposition. The difficulty which would arise, should such an enforced acceptance create a promise, is forcibly stated by Pollock, C.B.:—'Suppose I clean your property without your knowledge, have I then a claim on you for payment? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?'²

25 L. J. Exch. 329. Ante, p. 18.

The 'consideration executed upon request,' or the contract which arises on the acceptance by act of the offer of a promise is best illustrated by the case of an advertisement of a reward for services which becomes a promise to give the reward when the service is rendered. In such cases it is not the offeror, but the acceptor, who has done his part at the moment when he enters into the contract. If *A* makes a general offer of reward for information and

Offer of a promise for an act

¹ *Bowker v. Hoyt*, 18 Pick. (Mass.) 555.

² *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, H. & W. 14.

England v.
Davidson,
11 A. & E.
856.

X supplies the information, *A*'s offer is turned into a promise by the act of *X*, and *X* at one and the same time concludes the contract and performs his part of it.¹

And this form of consideration will support an implied as well as an express promise where a man is asked to do some service which will entail certain liabilities and expenses. *The request for such services implies a promise, which becomes binding when the liabilities [*95] or expenses are incurred, to make good his loss to the promisee. A lady employed an auctioneer to sell her estate; he was compelled in the course of the proceedings to pay certain duties to the Crown, and it was held that the fact of employment implied a promise to indemnify for money paid in the course of the employment. 'Whether the request be direct, as where the party is expressly desired by the defendant to pay; or indirect, as where he is placed by him under a liability to pay, and *does pay*, makes no difference.'²

Brittain v.
Lloyd,
14 M. & W.
762.

1 Sm. L. C.
153.

It is probably on this principle, the implication of a promise in a request, that the case of *Lampleigh v. Braithwait* is capable of explanation. If so, we do not need the theory that a subsequent promise to make a return for things done on request relates back to the request and is embodied in it. But of this we shall speak shortly.

Present
distinguish-
ed from past
consideration.

It remains to distinguish executed from past consideration.

A past consideration is, in effect, no consideration at all; that is to say, it confers no benefit on the promisor, and involves no detriment to the promisee in respect of his promise. A past consideration is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If afterwards, whether from good feeling or interested motives it matters

¹ *Reif v. Paige*, 55 Wis. 496.

² *Clark v. Randall*, 9 Wis. 135.

not, he makes a promise to the person by whose act or forbearance he has benefited, and that promise is made upon no other consideration than the past benefit, it is gratuitous and cannot be enforced; it is based upon motive and not upon consideration.¹

The rule that a past consideration will not support a subsequent promise is only another mode of saying that every promise, whether express or implied, must, in order to be binding, be made in contemplation of a present or future benefit to the promisor.

A purchased a horse from X, who afterwards, in consideration of the previous sale, promised that the [*96] horse was sound and free from vice. It was in fact a vicious horse. The court held that the sale created no implied warranty or promise that the horse was not vicious; that the promise must therefore be regarded as independent of the sale, and as an express promise based upon a previous transaction. It fell therefore 'within the general rule that a consideration past and executed will support no other promise than such as would be implied by law.'²

Roscorla v. Thomas,
3 Q. B. 234.

To the general rule thus laid down certain exceptions are said to exist; and it is proposed to endeavour to ascertain the nature and limits of these exceptions, which are perhaps fewer and less important than is sometimes supposed.

Exceptions.

(a) A past consideration will, it is said, support a subsequent promise, if the consideration was given at the request of the promisor.

(a) Consideration moved by previous request.

In *Lampleigh v. Braithwait*, which is regarded as the leading case upon this subject, the plaintiff sued the de-

Hobart, 105; and see 1 Sm. L. C. 158.

¹ *Dearborn v. Bowman*, 3 Met. (Mass.) 155, H. & W. 199; *Mills v. Wyman*, 3 Pick. (Mass.) 207, H. & W. 201; *Allen v. Bryson*, 67 Iowa, 591; *Shepard v. Rhodes*, 7 R. I. 470, H. & W. 210.

² *Bloss v. Kittridge*, 5 Vt. 28; *Summers v. Vaughan*, 35 Ind. 323; *Morehouse v. Comstock*, 42 Wis. 626; *Aultman v. Kennedy*, 33 Minn. 339.

fendant for £120 which the defendant had promised to pay to him in consideration of services rendered at his request. The court here agreed that a mere voluntary courtesy will not have consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit it will bind; 'for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit.'

The case of *Lampleigh v. Braithwait* was decided in the year 1615, and for some time before and after that decision, cases are to be found which go to show, more or less definitely, that a past consideration if moved by a previous request will support a promise.^a But from the middle of the seventeenth century until the present time no direct authority for the rule can be discovered, except the case of *Bradford v. Roulston*, decided in the Irish Court of Exchequer in 1858. The rule is laid down in text-books, but in the few cases in which *it is touched upon it is regarded as open to question, or as susceptible of a different interpretation to that which is placed upon it in the books. [*97]

⁵ Ir. C. L. 468.
Langdell,
450.

Modern
interpre-
tations of
the rule.

⁷ M. & Gr.
807.

Thus in *Kaye v. Dutton*, Tindal, C.J., first lays down the rule that where a consideration executed implies a promise of a particular sort, a subsequent promise based on the same consideration is not binding. By this he means that when from the acceptance of consideration executed, the law implies a promise by the acceptor to make a return, the consideration is exhausted upon that promise. There is nothing further to support a subsequent and independent promise.

He then goes on to say:—

'The case *may perhaps* be different where there is a consideration from which no promise would be implied by law: that is, where the party suing has sustained a detriment to himself or conferred a

^a See cases collected in the note to *Hunt v. Bate*, 3 Dyer, 272 a.

benefit on the defendant at his request under circumstances which would not raise any implied promise. In such cases it appears to have been held in *some instances* that the act done at the request of the party charged is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done. . . . But it is not necessary to pronounce any opinion upon that point.'

Kaye v.
Dutton,
7 M. & Gr.
816.

These words suggest that Tindal, C.J., regarded the old interpretation of the rule as open to question. Its application is further narrowed by Maule, J., in *Elderton v. Emmens*. 'An executed consideration will sustain only such a promise as the law will imply.'

4 C. B., at p.
496.

But in *Kennedy v. Broun*, Erle, C.J., puts the case of *Lampleigh v. Braithwait* from a modern point of view.

18 C. B., N. S.
677.

'It was assumed,' he says, 'that the journeys which the plaintiff performed at the request of the defendant and the other services he rendered would have been sufficient to make any promise binding if it had been connected therewith in one contract: the peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed. Probably at the present day, such service on such a request would have raised a promise by implication to pay what it was worth; and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount.'

p. 740.

This would seem to be the *ratio decidendi* in *Wilkinson v. *Oliveira*, where the plaintiff at the defendant's request gave him a letter for the purposes of a law-suit. The letter proved the defendant's case, by which means he obtained a large sum of money, and he subsequently promised the plaintiff £1000. Here the plaintiff evidently expected some return for the use of the letter, and the defendant's request for it was, in fact, an offer that if the plaintiff would give him the letter he would pay a sum to be hereafter fixed.

1 Bing. N. C.
490.

Regarded from this point of view the rule which we are discussing is no departure from the general doctrine as to past consideration. Where a request is made which is in substance an offer of a promise upon terms to be afterwards ascertained, and services are rendered in pursuance of that request, a subsequent promise to pay a fixed sum may be

regarded as a part of the same transaction, or else as evidence to assist the jury in determining what would be a reasonable sum.

S. Ir. C. L.
468,
Langdell,
Contr. 450.

In opposition to this view stands *Bradford v. Roulston*, the only case in modern times in which the rule in *Lampleigh v. Braithwait* has come before the courts for express decision. Bradford, who had a ship to sell, was introduced by Roulston to two persons who were willing to purchase it. At the time of the sale the purchasers were £55 short of the money agreed to be paid. Bradford nevertheless executed the bill of sale at the request of Roulston, and in consideration of this, Roulston upon a subsequent day guaranteed the payment of the balance of £55 still due. There seems to have been some evidence that the guarantee was given at the time of the sale and was subsequently put into writing, but the court felt it necessary to give an express decision, on the supposition that the consideration was wholly past, and held that the execution of the bill of sale to third parties upon the request of the defendant was consideration for a subsequent promise by him to answer for their default. The authorities were elaborately reviewed and the rule in *Lampleigh v. Braithwait* was adhered to in its literal sense.

*This decision cannot be received without hesitation. The case of *Wilkinson v. Oliveira* was treated [*99] as a direct authority for the rule in its widest sense, a view which, upon the facts of that case, is certainly open to question; and the great gap in the chain of express decisions on the point does not appear to have impressed the court.

Practical
difficulties
presented
by the
rule.

Obvious difficulties arise from such an interpretation of the rule. Is any limit to be assigned to the time which may elapse between the act done upon request and the promise made in consideration of it? This difficulty pressed upon the court in one of the oldest cases upon this subject, *Halifax v. Barker*, where a promise was

3 Dyer,
p. 272 a,
note; Cro.
Eliz. 741.

held not to be binding which was given upon consideration of a payment made upon request a year before. The case confirms the view that the subsequent promise is only binding when the request, the consideration, and the promise form substantially one transaction.

Another difficulty would arise as to the definition of 'a request.' Let us suppose that a man dangerously ill is informed by his physician that his state is so critical as to justify desperate remedies; the physician advises him to try a remedy which he believes may possibly restore him to health, but, if it does not do so, will probably kill him in a few hours; the remedy is of the physician's own invention, and he asks the patient under the almost hopeless conditions of the case to allow him to make the experiment. The patient tries the remedy and is cured; the fame of the cure makes the fortune of the physician, and a few years afterwards, finding himself in good circumstances, he promises to his former patient a sum of money in consideration of the use of his remedy at his request. One can hardly suppose that an action would lie upon such a promise. Yet the judgment in *Bradford v. Roulston* is explicit 'that where there is a past consideration, consisting of a previous act done at the request of the defendant, it will support a subsequent promise.'

I cannot avoid the conclusion that unless the *request* is [*100] *virtually an offer of a promise the precise extent of which is hereafter to be ascertained; or unless it contemplates a subsequent promise to be given by the maker of the request, so that such a promise may be regarded as a part of the same transaction, the rule in *Lampleigh v. Braithwait* has no application. And this view is supported by the language of Bowen, L.J., in a recent case.

Probable explanation of *Lampleigh v. Braithwait*.

'The fact of a past service raises an implication that at the time it was rendered it was to be paid for, and if it was a service which was

Stewart v. Casey, [1892] 1 Ch. 115.

to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered.'

It may not therefore be presumptuous to say that in spite of the cases decided between 1568 and 1635, of the continuous stream of dicta in text-books, and of the decision in *Bradford v. Roulston*, the rule cannot be received in such a sense as to form a real exception to the principle that a promise, to be binding, must be made in contemplation of a present or future benefit to the promisor.¹

¹ There are three classes of cases on this subject in the United States. (1) Those where there was a previous request from which a promise would be implied, and the implied promise is fortified by a subsequent express one. *Hicks v. Burhans*, 10 Johns. (N. Y.) 242, H. & W. 205; *Wilson v. Edmunds*, 24 N. H. 517. The supposed difficulty in these cases lies only in the fact that the court allows the jury to imply a previous request from the beneficial nature of the transaction where there is nothing in the evidence negating such a request. But if no promise could be implied from the request, as where the services were understood to be gratuitous, then a subsequent express promise is unavailing. *Allen v. Bryson*, 67 Iowa, 591. (2) Those where the courts adopt the broad doctrine that a moral obligation will support a subsequent promise, as in Georgia, Maryland, and perhaps Pennsylvania and Michigan. *Ante*, p. 94, note 3. See *Pool v. Horner*, 64 Md. 131. (3) Those where the courts adopt a modified doctrine that a moral obligation imposed by a consideration moving directly from the plaintiff to the defendant, and inuring to the benefit or enrichment of the defendant, will support a subsequent promise. *Boothe v. Fitzpatrick*, 36 Vt. 681; *Seymour v. Marlboro'*, 40 Vt. 171; *Doty v. Wilson*, 14 Johns. (N. Y.) 378 (*semble*); *Gleason v. Dyke*, 22 Pick. (Mass.) 390, H. & W. 206; *Goulding v. Davidson*, 26 N. Y. 604, 611-612.

The first class of cases simply supports the conclusion of the author. The secondary consideration as to whether the request must be proved affirmatively or may be implied from the beneficial nature of the transaction does not affect the main question. A considerable number of additional cases are often cited as sustaining *Lampleigh v. Braithwait*, but in every one the plaintiff was defeated and the remarks of the court are *obiter dicta*. *Chaffee v. Thomas*, 7 Cow. (N. Y.) 353; *Goldshy v. Robertson*, 1 Blackf. (Ind.) 247; *Carson v.*

(b) We find it laid down that 'where the plaintiff *voluntarily* does that whereunto the defendant was legally compellable, and the defendant afterwards, in consideration thereof, expressly promises,' he will be bound by such a promise. But I would submit that the authority for this rule wholly fails in so far as it rests on the cases which are habitually cited in support of it.

(b) Voluntarily doing what another was legally bound to do.
Smith, L. C. 1. 148.

Curiously enough, all the cases turn upon the liability of parish authorities for medical attendance upon paupers who are settled in one parish but resident in another.

Watson v. Turner (1767) was decided on the ground that the moral obligation resting upon overseers of a parish to provide for the poor would support a promise

Buller, Nisi Prius, p. 147.

But see 1 Selwyn's Nisi Prius, p. 51, n. 11.

Clark, 2 Ill. 113. In one case it is held that if the express promise is different in kind from the one the law would have implied, it is unenforceable. *Merrick v. Giddings*, 1 Mackey (D. C.), 394, 413.

The second class of cases must be regarded as exceptional and of no authority outside of the jurisdictions where they are decided.

The third class of cases presents an interesting question. These cases seem to fall midway between real contracts and quasi-contracts. They are based on the notion that it is inequitable for the defendant to enrich himself unjustly at the expense of the plaintiff, a notion that is the distinguishing feature in a large class of quasi-contracts. Keener, *Quasi-Cont.*, pp. 19, 363-373. Every unjust enrichment, however, will not found a quasi-contract. Some cases will do so; some cases are remediable only in equity; some cases are not remediable at all in contractual actions. *Cook v. Doggett*, 2 Allen (Mass.), 439; *Welsh v. Welsh*, 5 Ohio, 425; *Schreve v. Grimes*, 4 Litt. (Ky.) 220; cf. *Clark v. Davidson*, 53 Wis. 317; *Phillips v. Homfray*, L. R. 24 Ch. D. 439; Keener, pp. 164-165, 369-370. If there be an obligation of this sort enforceable either at law or in equity, and the defendant expressly promises to discharge the obligation, there would seem to be strong reasons for enforcing the promise. Cf. *Bridges v. Bidwell*, 20 Neb. 185; *Starr v. Wright*, 20 Oh. St. 97; *Elliott v. Horn*, 10 Ala. 348. The case is like the first class where an existing implied obligation is fortified by an express one. The difficulty is as to the cases where, although there is unjust enrichment, there is no legal obligation to repay. This presents an anomaly, and may be the one case where a moral obligation should be held to sustain a promise. Perhaps it might be possible to distinguish by calling this an 'equitable' consideration as opposed to moral considerations generally.

made by them to pay for services previously rendered to a pauper by a medical man.

2 East, 505.

*In *Atkins v. Banwell* (1802) it was held that the moral obligation resting upon the parish in [*101] which a pauper is settled, to reimburse another parish, in which the pauper happened to be taken ill, for expenses incurred in medical attendance, is not sufficient to create a legal liability without an express promise.

1 B. & Ald.
105.

In *Wing v. Mill* (1817), the pauper was also residing out of his parish of settlement; but that parish acknowledged its liability for his maintenance by making him a weekly allowance. The pauper fell ill and died; during his illness he was attended by Wing, an apothecary, who, after the pauper's death, was promised payment of his bill by Mill, the overseer of the parish of settlement. The court held the overseer liable.

It is not easy to ascertain the grounds of their decision from the judgments of Lord Ellenborough, C.J., and Bayley, J. Some sentences suggest that they held, on the authority of *Watson v. Turner*, that a moral obligation will support a promise; others suggest that they held that there was a legal obligation cast on the parish of residence to do that which the parish of settlement might legally have been compelled to do, and that a quasi-contractual relation thus arose between the parties; others again suggest that the allowance made to the pauper by the parish of settlement showed a knowledge that the pauper was being maintained at their risk, and amounted to an implied authority for bestowing the necessary medical attendance. This last is the view entertained as to the *ratio decidendi* in *Wing v. Mill* by the Court of Exchequer in the only case remaining for examination.

See chapter
on Quasi-
Contract.

1 C. & M.
810.

In *Paynter v. Williams* (1833) the facts were similar to those in *Wing v. Mill*, with this very important exception, that there was no subsequent promise to pay the

apothecary's bill. The defendant parish, the parish of settlement, was nevertheless held liable to pay for medical attendance supplied by the parish of residence. The [*102] payment of an *allowance by the parish of settlement was held by Lord Lyndhurst, C.B., to amount 'to a request on the part of the officers that the pauper shall not be removed, and to a promise that they will allow what was requisite.'

It would seem then that the promise in the cases cited to support this supposed rule, was either based upon a moral obligation, which, since the decision in *Eastwood v. Kenyon*, would be insufficient to support it, or was an acknowledgment of an existing liability arising from a contract which might be implied by the acts of the parties,—a liability which, as *Paynter v. Williams* shows, did not need a subsequent promise to create it.

11 A. & E.
488.

And this is stated on high authority to be the true ground upon which the decision in *Watson v. Turner* may be supported.

'The defendants, being bound by law to provide for the poor of the parish, derived a benefit from the act of the plaintiff, who afforded that assistance to the pauper which it was the duty of the defendants to have provided: this was the consideration, and the subsequent promise by the defendants to pay for such assistance *was evidence from which it might be inferred that the consideration was performed by the plaintiff with the consent of the defendants*, and consequently sufficient to support a general *indebitatus assumpsit* for work and labour performed by the plaintiff for the defendants, at their request.'

1 Selwyn's
Nisi Prius,
p. 51, n. 11.

The rule, as habitually laid down, if not non-existent, must be admitted to rest on scanty and unsatisfactory authority. One wonders that it should have been so often reiterated without examination. "1

^a These *eidola* of the text-books have been stereotyped in the Indian Contract Act, s. 2. sub-s. (d) and s. 25. sub-s. 2.

¹ This class of cases clearly falls within the third class discussed in the preceding note. The defendant has been enriched at the expense of the plaintiff, but under circumstances giving no remedy in equity

(c) Real exception to general rule: Reviving obligations barred by rule of law.

(c) A real exception to the general rule is to be found in the cases in which a person has been held capable of reviving an agreement by which he has benefited, although by rules of law since repealed, incapacity to contract no longer existing, or mere lapse of time, the agreement is not enforceable against him. The principle upon which these cases rest is,

‘that where the consideration was originally beneficial to the party *promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, [*103] he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it.’

Parke, B.,
in *Earle v.*
Oliver,
2 Exch. 90.

The following illustrations of the principle are to be found in the Reports.

Williams v.
Moor, 11 M.
& W. 256.

37 & 38 Vict.
c. 62.

Trueman v.
Fenton, 2
Cowp. 544.
12 & 18 Vict.
c. 106. § 204.

(1) A promise by a person of full age to satisfy debts contracted during infancy was binding upon him before the Infants’ Relief Act made it impossible to ratify, on the attainment of majority, a promise made during infancy.¹

(2) A promise made by a bankrupt, discharged from debts by a certificate of bankruptcy, to satisfy the whole or part of debts due to a creditor was binding before 1850.^{a 2}

^a By 6 Geo. IV. c. 16. § 131 this promise had to be in writing. At the present day such a promise is only binding if there be new consideration. For the history and present state of the law on this point see *Jakeman v. Cook*, 4 Ex. D. 26.

or in quasi-contract; he promises to pay for such enrichment; such promise is enforceable on the ground of ‘equitable’ consideration. *Gleason v. Dyke*, 22 Pick. (Mass.) 390, II. & W. 206; *Doty v. Wilson*, 14 Johns. (N. Y.) 378. Cf. *Curtis v. Parks*, 55 Cal. 106. Another ground suggested is that the defendant ‘ratifies’ the act of the plaintiff who represented him in the transaction, and the ratification is equivalent to a prior authority. *Gleason v. Dyke*, *supra*.

¹ *Reed v. Batchelder*, 1 Met. (Mass.) 559; *Minock v. Shortridge*, 21 Mich. 304; *Stern v. Freeman*, 4 Met. (Ky.) 309.

² *Dusenbury v. Hoyt*, 53 N. Y. 521, II. & W. 208; *Edwards v. Nelson*, 51 Mich. 121. Cf. *Shepard v. Rhodes*, 7 R. I. 470, H. & W. 210; *Wiggin v. Hodgdon*, 63 N. H. 32.

(3) A debt barred by the Statute of Limitations is consideration for a subsequent promise to pay it.¹

(4) In *Lee v. Muggeridge* a married woman gave a bond for money advanced at her request to her son by a former husband. Afterwards, when a widow, she promised that her executors should pay the principal and interest secured by the bond, and it was held that this promise was binding.² 5 Taunt. 36.

(5) In *Flight v. Reed* bills of exchange were given by the defendant to the plaintiff to secure the repayment of money lent at usurious interest while the usury laws were in force. The bills were by those laws rendered void as between the plaintiff and defendant. After the repeal of the usury laws by 17 & 18 Vict. c. 90 the defendant renewed the bills, the consideration for renewal being the past loan, and it was held that he was liable upon them.³ 1 H. & C. 703.

There are certain features common to all these cases. In each the parties were clearly agreed: in each, one of the parties has got all that he bargained for, while the other cannot obtain what he was promised, either because he has *dealt with one who was incapable of contracting, or because a technical rule of law forbids the agreement to be enforced. If the party who has received the benefit which he expected from the agree-

Common elements in all the cases.

¹ *Isley v. Jewett*, 3 Met. (Mass.) 439; *Keener v. Crull*, 19 Ill. 189.

² *Accord*: *Sharpless' Appeal*, 140 Pa. St. 63; *Goulding v. Davidson*, 26 N. Y. 604, where Balcom, J., says, "I will add that the fact is controlling with me, that the defendant personally received a valuable consideration for the money she has promised to pay, and this distinguishes the case from some that seem to weigh against the conclusion that the defendant's promise is valid." *Contra*: *Waters v. Bean*, 15 Ga. 358; *Kent v. Rand*, 64 N. H. 45; *Putnam v. Tennyson*, 50 Ind. 456; *Hayward v. Barker*, 52 Vt. 429. *Lee v. Muggeridge* is generally disapproved in the United States, except where a moral consideration will support a promise.

³ *Hammond v. Hopping*, 13 Wend. (N. Y.) 505.

ment afterwards acquires capacity to contract; or if the rule of law is repealed, as in the case of the usury acts; or, as in the case of the Statute of Limitations, admits of a waiver by the person whom it protects, then a new promise based upon the consideration already received is binding.

They do
not rest
upon
moral
obliga-
tion.

The cases thus regarded seem a plain and reasonable exception to the general rule that a past consideration will not support a promise. Unfortunately, they were at one time based upon the *moral obligation* which was supposed to bind the person benefited and to give efficacy to his promise.

It would have seemed enough to have said that when two persons have made an agreement, and one has got all the benefit which he expected from it, and is protected by technical rules of law from doing what he had promised to do in return, he will be bound if, when those rules have ceased to operate, he renews his original promise. But when once the law of contract was brought into the cloudland of moral obligation, it became extremely hard to say what promises might or might not be enforced. The phrase was far larger than the circumstances needed, and the language used in some of the cases cited above was calculated to make the validity of contracts turn upon a series of ethical problems. In *Lee v. Muggeridge*, Mansfield, C.J., says, 'It has long been established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. The only question therefore is whether upon this declaration there appears a good moral obligation.'

5 Taunt. 46.

Littlefield v.
Shee, 2 B. &
A. 811.

In no case did 'moral obligation' play a more prominent part than in *Lee v. Muggeridge*; but the doctrine, after it had undergone some criticism from Lord Tenterden, was finally limited by the decision in *Eastwood v. Kenyon*. The sufficiency of moral obligation to support a

[*105] promise was there definitely *called in question. Eastwood had been guardian and agent of Mrs. Kenyon, and, while she was a minor, had incurred expenses in the improvement of her property: he did this voluntarily, and in order to do so was compelled to borrow money, for which he gave a promissory note. When the minor came of age she assented to the transaction, and after her marriage her husband promised to pay the note. Upon this promise she was sued. The moral duty to fulfil such a promise was insisted on by the plaintiff's counsel, but was held by the court to be insufficient where the consideration was wholly past. 'Indeed,' said Lord Denman in delivering judgment, 'the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.'

11 A. & E.
450.

Thus was finally overthrown the doctrine formulated by Lord Mansfield that consideration was only one of various modes by which it could be proved that parties intended to contract: a doctrine which, in spite of the decision in *Rann v. Hughes*, survived in the theory that the existence of a moral obligation was evidence that a promise was intended to be binding. Consideration is not one of several tests, it is the only test of the intention of the promisor.¹

7 T. R. 350.
(n).

¹ The general doctrine of promises which operate as waivers of a technical bar interposed by law, is well stated and discussed in *Smith v. Tripp*, 14 R. I. 112. Another instance of such waivers is the case of a promise by an indorser or drawer of a negotiable instrument, who has been discharged for want of due notice of dishonor. *Sigeron v. Mathews*, 20 How. (U. S.) 496; *Ross v. Hurd*, 71 N. Y. 14; *Hobbs v. Straine*, 149 Mass. 212. Such subsequent promises are in some cases, particularly in the case of infants, bankrupts, and debtors discharged by the Statute of Limitations, required to be in writing. N. Y. Code Civ. Pro., § 395; L. of N. Y. 1882, c. 324; Stimson, Am. St. Law, § 4147.

Another exception to the rule that a past consideration will not support a promise exists in the case where a debtor gives additional

CHAPTER III.

Capacity of Parties.

Further
subjects of
inquiry.

IN the topics which we have hitherto discussed we have dealt with the primary elements of contract. The parties must be brought together by offer and acceptance, and they must make an agreement which the courts will regard as a legal transaction either by reason of its form, or because of the presence of consideration.

But such a transaction may take place between parties, one or both of whom are under some disability for making a valid contract: it is therefore necessary to deal with these disabilities: in other words with the capacity of parties.

Capacity of
parties.
How it may
be affected.

Certain persons are by law incapable, wholly or in part, of binding themselves by a promise, or of enforcing a promise made to them. And this incapacity may arise from the following causes:—

(1) Political or professional status.

(2) Youth, which, until the age of 21 years, is supposed to imply an immaturity of judgment needing the protection of the law.

security to his creditor, or a principal to his surety, on a pre-existing debt, without any new consideration. "No case can be found in which a man's own debt has been ruled to be an insufficient consideration between him and his creditor, for a mortgage or other security received by the latter from the debtor." *Turner v. McFee*, 61 Ala. 468; *Paine v. Benton*, 32 Wis. 491; *Duncan v. Miller*, 64 Iowa, 223; *Williams v. Silliman*, 74 Tex. 626. So the transfer of a negotiable instrument as security for a pre-existing debt is on a sufficient consideration as between the parties; whether it is as to third parties the American cases are not agreed. *Bay v. Coddington*, 20 Johns. (N. Y.) 637; *Oates v. Nat. Bk.*, 100 U. S. 239.

(3) Artificiality of construction, such as that of corporations, which, being given a personality by law, take it upon such terms as the law imposes.

(4) The permanent or temporary mental aberration of lunacy or drunkenness.

(5) Until the 1st of January 1883 marriage effected a merger of the contractual capacity of the wife in that of her husband, subject to certain exceptions. The Married [*107] *Woman's Property Acts of 1882 and 1893 have greatly changed the law in this respect.

§ 1. *Political or professional status.*

(1) *Political status.*

An alien has the contractual capacity of a natural-born British subject, except that he cannot acquire property in a British ship.¹

An alien.

An alien enemy, or British subject adhering to the king's enemies,^a cannot, without license from the crown, make any fresh contract or enforce any existing contract during the continuance of hostilities; but his rights as to contracts made before the commencement of war are suspended, not annulled, and can be enforced (subject to the effect of the Statute of Limitations) upon the conclusion of peace.²

An alien enemy. . .
O'Mealey
v. Wilson,
1 Camp. 48.

Foreign states and sovereigns and their representatives, the officials and household of their representatives, are not

Foreign
sove-
reigns.

^a It does not seem to be clearly settled that anything short of residence in a hostile country for trading purposes constitutes adherence to the king's enemies. The case of *Roberts v. Hardy*, 3 M. & S. 533, exhibits the reluctance of the courts to draw conclusions from the mere fact that a man was resident in a hostile country when it was possible for him to have removed.

¹ See Stimson, Am. St. Law, §§ 102, 5286, 6010-19; U. S. Rev. Stat., § 4131, and index, title "Aliens;" *Taylor v. Carpenter*, 3 Story (U. S.), 458.

² *United States v. Grossmayer*, 9 Wall. (U. S.) 72, H. & W. 215; *Kershaw v. Kelsey*, 100 Mass. 561; *Griswold v. Waddington*, 16 Johns. (N. Y.) 438. There is a possible exception in the case of contracts for necessities. *Crawford v. The William Penn*, 3 Wash. C. C. (U. S.) 484.

Taylor v.
Best, 14 C.B.
457.

subject to the jurisdiction of the courts of this country unless they submit themselves to it. Their contracts cannot therefore be enforced against them unless they so choose, although they are capable of enforcing them. This immunity extends to a British subject accredited to Great Britain by a foreign state.¹

Macartney
v. Garbutt, 24
Q. B. D. 363.

Mighell v.
The Sultan
of Johore,
[1894] 1 Q.B.
(C.A.) 149.

A recent case illustrates the rule. A foreign sovereign residing in this country as a private person, made a promise of marriage under an assumed name. He did not thereby subject himself to the jurisdiction of our courts.

Felon un-
dergoing
sentence.

A person convicted of treason or felony cannot, during the continuance of his conviction, make a valid contract; nor can he enforce contracts made previous to conviction: but these may be enforced by an administrator appointed for the purpose by the crown.²

33 & 34 Vict.
c. 23, §§ 8, 9,
10.

Barrister.

*A barrister cannot sue for fees due to him for services rendered in the ordinary course of his profes-^[*108]sional duties, whether the action be framed as arising upon an implied contract to pay for services rendered on request, or upon an express contract to pay a certain sum for the conduct of a particular business.

Kennedy v.
Broun,
13 C. B.,
N. S. 677.

Physician.

A physician, until the year 1858, was so far in the position of a barrister that the rendering of services on request raised no implied promise to pay for them, though the patient might bind himself by express contract. The Act 21 & 22 Vict. c. 90. § 31 enabled every physician to sue on such an implied contract, subject to the right of any college of physicians to make by-laws to forbid the exercise of this privilege by their fellows. And this is re-enacted in substance by the Medical Act 1886.³

49 & 50 Vict.
c. 43, § 6.

¹ *King of Prussia v. Kuepper's Adm'r*, 22 Mo. 550.

² Not so generally in the United States. *Estate of Nerac*, 35 Cal. 392.

³ In the United States lawyers and physicians who are duly licensed are under no such disability. *Vilas v. Downer*, 21 Vt. 419.

§ 2. *Infants*.¹

The rights and liabilities of infants under contracts entered into by them during infancy rest upon common law rules which have been materially affected by statute. I will first state the common law upon the subject. (2) *Infants*.

Common law treated an infant's contract as being voidable at his option, either before or after the attainment of his majority.² But the rule was thus limited:— General rule of common law. Infant's contract voidable.

(1) The contract ceased to be voidable if ratified upon the attainment of 21 years of age.

(2) The contract was not voidable if it were for necessities, or, in certain cases, if it were for the infant's benefit.

(1) *Ratification, and the Infants' Relief Act.*

Sir F. Pollock, in an exhaustive argument, shows clearly that by the rules of common law the contract of an infant was not void but voidable at his option even though it were not for the infant's benefit. Being so voidable, the infant might (apart from statutory restrictions) affirm and ratify his contract when he attains his majority, and thus assume the rights and liabilities arising from it. It may Pollock on Contracts, pp. 53-60, 5th ed.
(i) *Ratification*.

Williams v. Moor, 11 M. & W. 256.

¹ The age of majority for women is fixed at eighteen in some States. Stimson, Am. St. Law, § 6601. Majority is reached on the first minute of the day preceding the twenty-first birthday. *Bardwell v. Purrington*, 107 Mass. 419; *Hamlin v. Stevenson*, 4 Dana (Ky.), 597. Some States provide that emancipation may hasten the age of majority. Stimson, Am. St. Law, § 6606.

² In the United States it has been held that an infant's contracts fall into three classes: (1) The contract for the appointment of an agent, which is void; (2) the contract for necessities, which is binding; (3) all other contracts, which are voidable at his election. *Fetrow v. Wiseman*, 40 Ind. 148. The first proposition is sustained by some authorities in general terms. *Trueblood v. Trueblood*, 8 Ind. 195, H. & W. 218. But it is confined by others to the appointment of an attorney in fact by a formal power of attorney. *Hastings v. Dollarhide*, 24 Cal. 195; *Hardy v. Waters*, 38 Me. 450; *Huffcut on Agency*, § 15. The matter is sometimes regulated by statute. Stimson, Am. St. Law, § 6602. An unexecuted contract of marriage may be avoided. *Rush v. Wick*, 31 Oh. St. 521. So also an executory contract for necessities. *Gregory v. Lee*, 64 Conn. 407.

be well to *remind the reader that such a ratification is, or was, an illustration of the limited class of cases [*109]

Ante, p. 103.

in which a past consideration has been allowed to support a subsequent promise.

Ratification of two kinds.

Some contracts were invalid unless ratified, others valid unless disaffirmed within a reasonable time. It would seem that where an infant acquired an interest in permanent property to which obligations attach, or entered into a contract which involves continuous rights and duties, benefits and liabilities, and took some benefit under the contract, he would be bound unless he expressly disclaimed the contract. On the other hand, a promise to perform some isolated act, or a contract wholly executory, would not be binding upon the infant unless he expressly ratified it upon coming of age.

Contracts valid until rescinded.

Illustrations of contracts requiring a special disclaimer to avoid them — valid unless rescinded — may be found in the following cases. These do not appear to be affected by recent legislation.

Interests in realty, Rolle, Abr. 731.

An infant lessee who occupies until majority is liable for arrears of rent which accrued during his minority.

Shareholders who became possessed of their shares during infancy are liable for calls which accrued while they were infants.

in corporate property,

‘They have been treated therefore as persons in a different situation from mere contractors, for then they would have been exempt: but in truth, they are purchasers who have acquired an interest, *not in a mere chattel, but in a subject of a permanent nature*, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate who has taken possession, and thereby becomes liable to all the obligations attached to the estate; for instance, to pay rent in the case of a lease rendering rent, and to pay a fine due on the admission in the case of a copyhold to which an infant has been admitted, unless they have *elected to waive or disagree the purchase altogether*, either during infancy or after full age, at either of which times it is competent for an infant to do so.’

Evelyn v. Chichester, 3 Burr. 1717.

N. W. R. Co. v. McMichael, 5 Ex. 114.

Similarly an infant may become a partner, and at common *law may be entitled to benefits, though not liable for debts, arising from the partnership during his infancy. Equity however would not allow an infant, in taking the partnership accounts, to claim to be credited with profits and not debited with losses. But what is important for our present purpose to note is, that unless on the attainment of majority there be an express rescission and disclaimer of the partnership, the partner will be liable for losses accruing after he came of age.

in partner-
ship.

Lindley,
Partnership,
74.

Where an infant held himself out as in partnership with *X*, and continued to act as a partner till shortly before he came of age, and then, though ceasing to act as a partner, did nothing to disaffirm the partnership, he was held liable on debts which accrued, after he came of age, to persons who supplied *X* with goods.

‘Here,’ said Best, J., ‘the infant, by holding himself out as a partner, contracted a *continual obligation*, and that obligation remains till he thinks proper to put an end to it.

. . . If he wished to be understood as no longer continuing a partner, *he ought to have notified it to the world.*’

Goode v.
Harrison,
5 B. & Ald.
159.

And so where shares were assigned to an infant who attained his majority some months before an order was made for winding up the company, it was held that in the absence of any disclaimer of the shares the holder was liable as a contributory.

Lumsden’s
Case,
4 Ch. 81.

Although the liabilities incurred by the infant are somewhat different in these different cases, yet there is this feature common to all of them, that nothing short of express disclaimer will entitle a man, on attaining his majority, to be free of obligations such as we have described. It is otherwise in contracts which are not thus continuous in their operation. The infant was not bound unless he expressly ratified them.¹

Contracts
invalid
until
ratified.

¹ It is generally held that where an infant has taken personal property or a conveyance of real property under a contract, he must dis-

Such was the common law upon the subject: let us consider how it has been affected by legislation.

9 Geo. iv. c.
14.

*Lord Tenterden's act required that ratification should be in the form prescribed by the act. [*111]

This enactment was rendered unnecessary by the Infants' Relief Act, and was repealed by the Statute Law Revision Act of 1875.

Infants'
Relief Act.

The Infants' Relief Act of 1874 appears to have been designed to guard not merely against the results of youthful inexperience, but against the consequences of honourable scruples as to the disclaimer of contracts upon the attainment of majority. Its provisions are as follows:—

87 & 88 Viet.
c. 62.

1. 'All contracts whether by specialty or by simple contract henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity enter, except such as now by law are voidable.

2. 'No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not

affirm within a reasonable time after reaching his majority, or he will be held to have ratified. *Boyden v. Boyden*, 9 Met. (Mass.) 519; *Walsh v. Powers*, 43 N. Y. 23; *McClure v. McClure*, 74 Ind. 108. It is often held that the same rule applies to his own conveyance of property by deed to the adult; *Hastings v. Dollarhide*, 24 Cal. 195; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468; but this is denied in other cases; *Green v. Green*, 69 N. Y. 553; *Wells v. Seixas*, 24 Fed. Rep. 82; although his silence coupled with other circumstances may amount to ratification. *Irvine v. Irvine*, 9 Wall. (U. S.) 617. The statement is sometimes made broadly that an infant's executed contracts are good until disaffirmed, while his executory contracts require express ratification; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *State v. Plaisted*, 43 N. H. 413; *Minock v. Shortridge*, 21 Mich. 304; but this statement is not sustained by the adjudicated cases. *Green v. Green*, *supra*.

be any new consideration for such promise or ratification after full age.'¹

The act suggests some points of difficulty: its precise meaning, if indeed a precise meaning was present to the minds of its framers, must be sought with care; we must examine the two sections and the constructions which have been placed on them by the courts.

The first section applies only to contracts of a certain class, and these it makes void. But to this rule there are two specified exceptions. (1) Contracts for necessities are binding on the infant although they may take the form of a loan of money or supply of goods. (2) Contracts into which an infant may enter 'by any existing or future statute, or by rules of common law or equity,' and which were not voidable at the date of the enactment, are not affected by the act.

The first section.

*This second exception needs an explanation.
[*112] Before the act of 1874 an infant's contracts for

¹ In the United States an infant may ratify, but in some States his ratification must be in writing. Stimson, Am. St. Law, § 4147. The deed of an infant is void in at least one. *Ib.* §§ 6602-3. Unless the statute requires a writing, the ratification may be by express words or may be inferred from conduct. In the case of an unexecuted promise it is generally held that the words relied upon as a ratification must be something more than a mere acknowledgment of the debt, and must import a promise to pay it; *Hale v. Gerrish*, 8 N. H. 374; *Ford v. Phillips*, 1 Pick. (Mass.) 202; *Fetrow v. Wiseman*, 40 Ind. 148; though there is authority to the contrary. *Henry v. Root*, 33 N. Y. 526. Conduct, however, may be equivalent to an express promise, as by bringing suit against the other party, by accepting the consideration, or by a sale of the consideration already received. *Middleton v. Hoge*, 5 Bush (Ky.), 478; (cf. *Burdett v. Williams*, 30 Fed. Rep. 697); *Keegan v. Cox*, 116 Mass. 289; *Minock v. Shortridge*, 21 Mich. 304; *Clark v. Van Court*, 100 Ind. 113; *Miller v. Sims*, 2 Hill (S. C.), 479. It is generally stated that the ratification must be made with knowledge that there is no legal liability; *Turner v. Gaither*, 83 N. C. 357; *Trader v. Lowe*, 45 Md. 1; *Hatch v. Hatch*, 60 Vt. 160; *Hinely v. Margaritz*, 3 Pa. St. 428; though there is authority to the contrary. *Clark v. Van Court*, 100 Ind. 113; *Anderson v. Soward*, 40 Oh. St. 325.

necessaries were binding, and his other contracts were as a rule voidable. We must therefore look for contracts which were not for necessaries and yet were not voidable. Such are to be found where an infant enters into a contract of service so as to provide him with the means of self-support.

‘It has always been clearly held that contracts of apprenticeship and with regard to labour are not contracts to an action on which the plea of infancy is a complete defence. The question has always been whether the contract, *when carefully examined in all its terms*,^a is for the benefit of the infant. If so the court will not allow the infant to repudiate it.’

Clements v.
L. & N. W.
R. Co. [1894]
3 Q. B. 482.

Here an infant entered into a contract of service with a railway company, promising to accept the terms of an insurance against accidents in lieu of his rights of action under the Employers’ Liability Act. It was held that the contract was for his benefit and that he was bound by his promise. And an infant may be held liable for the breach of such a contract under the Employers and Workmen Act 1875.^b

43 & 44 Vict.
c. 42.

Leslie v.
Fitzpatrick,
3 Q. B. D. 229.

Apart from the two exceptions aforesaid the section seems clear, and has been strictly construed.

Decisions
on § 1.

An infant who had contracted trading debts was convicted on an indictment charging him with having defrauded his creditors within the meaning of the Debtors’ Act 1869. The conviction was quashed on the ground that the transactions which resulted in debts were void under the Infants’ Relief Act. There were consequently no creditors to defraud. On the same reasoning an infant cannot be made a bankrupt in respect of such debts.

R. v. Wilson,
5 Q. B. D.
(C. C. R.) 28.

Ex parte
Jones, 18
Ch. D. 109.

^a See the recent cases *Corn v. Matthews*, (1893) 1 Q. B. 310, and *Flower v. L. & N. W. Railway Co.*, (1894) 2 Q. B. 65.

^b 38 & 39 Vict. c. 90. No civil proceedings can be taken against an infant on an apprenticeship deed; though if he misbehave he may be corrected by his master, or brought before a justice of the peace. *De Francesco v. Barnum*, 43 Ch. D. 165. *Gylbert v. Fletcher*, Cro. Car. 179.

But, it may be asked, can an infant who has received [*113] *goods and paid their price recover his money, or the tradesman his goods, on the ground that the transaction is void?

This much is clear, that if an infant has paid money and taken benefit under the contract he cannot recover the money so paid.

An infant hired a house and agreed to pay the landlord £100 for the furniture. He paid £60 and gave a promissory note for the balance. After some months' use of the house and furniture he came of age, and then took proceedings to get the contract and the promissory note set aside, and to recover the money which he had paid. He obtained relief from future liabilities on the contract and note, but could not recover money paid for furniture of which he had enjoyed the benefit.

Valentini v. Canali, 24 Q. B. D. 166.

Goods paid for and used.

On the other hand, although there is no authority precisely in point, the case of *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.* shows that an infant who has bought shares on which no dividend has been paid, may within a reasonable time repudiate the shares and recover the money. In this case six weeks had elapsed, and the infant had not attended any meeting or otherwise affirmed his position as a shareholder. Although the purchase of shares in a company is not a transaction which would fall under § 1 of the Infants' Relief Act, the language of the court is so full and explicit as to suggest a general rule, that where benefit has been received the infant cannot recover money paid; that where no benefit has been received he can.

[1894] 3 Ch. 589.

The second section would seem to deal with all contracts except those which are excluded from the operation of § 1. A man of full age cannot make himself liable upon a contract entered into during infancy, even though there be fresh consideration for his ratification of such liability.

The second section.

But we must note some points which are not quite obvious in reading the section.

Infant's
right of
action.

The contract cannot be enforced *against* the party who *contracted during infancy, but he may sue upon it. [*114] The words of the section do not avoid the contract; they only make it unenforceable against one of the parties. But though damages may be recovered, specific performance cannot be obtained for the reason that the contract cannot be mutually enforced.

Implied
ratifica-
tion.

Next we must take note of the fact that the old distinction still exists between contracts which needed ratification to affirm them and contracts which needed renunciation to avoid them. Three cases establish this important distinction.

In re
Yeoland's
Consols,
58 L. T.
922.

An infant received an assignment of shares in 1883: he said he would repudiate them, but did not do so. He reached full age in 1886: in 1887 the company was wound up and he was not permitted to take his name off the list of contributories.

Whitting-
ham v.
Murdy,
60 L. T.
956.

An infant became a member of a building society, received an allotment of land, and for four years after he came of age paid instalments of the purchase money. Then he endeavoured to repudiate the contract. He was not permitted to do so.

Carter v.
Silber,
[1892] 2 Ch.
(C. A.) 278.
Edwards v.
Carter,
[1898]
A. C. 360.

An infant became a party to a marriage settlement, under which he took considerable benefits. Nearly four years after coming of age he repudiated the settlement. It was held that a contract of this nature was binding unless repudiated within a reasonable time of the attainment of majority, and that he was too late.

Farrington
v. Forrester,
[1893] 2 Ch.
D. 461.

Reasonableness in respect of time must depend entirely on the circumstances of each case. A lapse of more than thirty years has been held not to bar the right to avoid a settlement made during infancy, but in that case the settlement had remained inoperative during the whole time, and the infant had been ignorant of its provisions.

On the other hand, the courts have been strict in their application of § 2 to contracts of the sort that, before the act, were invalid unless ratified.

King, an infant, became liable to a firm of brokers for [*115] **£547*: after he came of age they sued him, and he compromised the suit by giving two bills of exchange for £50. The firm endorsed one of the bills to Smith, who sued upon it. The Queen's Bench Division held that the bills were a promise, based on a new consideration, to pay a debt contracted during minority, that here was a ratification of the sort contemplated by the act, and that Smith could not recover.

Express
ratifica-
tion.

‘We have in the present case,’ said Charles, J., ‘first a promise by King during his minority to pay a sum of money; secondly, a promise by him after full age to pay a portion of that sum. It is said that the forbearance of the then plaintiffs to carry on their action afforded a new consideration and a good consideration for King’s promise to pay the bills of exchange. In my opinion, however, that case is amply provided for by § 2 of the act. I think that there was here a new consideration for the defendant’s promise; but the section expressly says that no action shall be brought on such a promise even where there is a new consideration for it. The case of *ex parte Kibble* seems strongly to support that view. In that case the plaintiff had obtained a judgment by default for a debt incurred by the defendant during infancy, and the judgment had been followed by a judgment debtor summons and a petition for an adjudication in bankruptcy. The court inquired into the consideration for the judgment, and finding that it was a debt contracted during infancy held that § 2 applied to the case, and dismissed the petition for adjudication.’

L. R. 10
Ch. 373.

Smith v.
King, [1892]
2 Q. B. 543.

But there are cases in which it has been found difficult to distinguish between the ratification of an old promise, and the making of a new one.

Ratifica-
tion and
new prom-
ise.

Where the parties to mutual promises of marriage remain on the footing of an engaged couple after the promisor has attained his majority, the maintenance of the engagement has been held to be a ratification, and to be insufficient to sustain an action for breach of the promise. But where the mutual promises made during infancy are conditional on consent of the man’s parents,

Coxhead v.
Mullis,
3 C. P. D.
439.

Northeote v.
Doughty,
4 C. P. D.
385.

and the promise is renewed by him after majority with their consent; or where an engagement is made during minority with no date fixed for the marriage, and after the man comes of age the parties agree *to name a day on which it shall take place, the promises so made have been held to be new promises, and the breach of them is actionable. [*116]

Ditcham v.
Worrall,
5 C. P. D.
410.

(ii) Neces-
saries —
what are
they?

(2) *Necessaries.*

We must now consider what are 'necessaries'; and what is the liability of an infant in respect of them.¹

It has always been held that an infant may bind himself by contract for the supply to him not merely of the necessities of life, but of such things as are suitable to his station in life and to his particular circumstances at the time.² The *locus classicus* on this subject is the judgment of Bramwell, B., in *Ryder v. Wombwell*,—a judgment the conclusions of which were adopted by the

L.R. 3 Exch.
90.
L.R. 4 Exch.
32.

¹ The modern American cases tend to hold that an infant's liability for necessities rests upon the doctrines of quasi-contract. He is liable not because he agreed to be, but because it is good public policy that he should be. "The obligation of an infant to pay for necessities actually furnished him does not seem to arise out of a contract in the legal sense of that term, but out of a transaction of a quasi-contractual nature; for it may be imposed on an infant too young to understand the nature of a contract." *Gregory v. Lee*, 64 Conn. 407, 413; *Trainer v. Trumbull*, 141 Mass. 527, H. & W. 220. So he is compelled to pay, not what he promised, but what he ought to pay; and he is not liable upon a partly executed contract for necessities beyond the value of what he has received, for as to the rest he may avoid the contract. *Gregory v. Lee*, *supra*.

² These have been held necessities: dentistry, — *Strong v. Foote*, 42 Conn. 203; attorney's services for personal defence, — *Barker v. Hibbard*, 54 N. H. 539; *Askey v. Williams*, 74 Tex. 294; but not for defence of estate, — *Phelps v. Worcester*, 11 N. H. 51; cf. *Epperson v. Nugent*, 57 Miss. 45; a bridal outfit, — *Jordan v. Coffield*, 70 N. C. 110; and, in general, board, lodging, clothing, medical attendance, etc., — *Saunders v. Ott*, 1 McCord (S. C.), 572; *Price v. Sanders*, 60 Ind. 310. These have been held not necessities in particular cases: a buggy, — *Howard v. Simpkins*, 70 Ga. 322; a bicycle, — *Pyne v. Wood*, 145 Mass. 558; college education, — *Middlebury College v. Chandler*,

Exchequer Chamber. The main difficulty is to determine the provinces of the court and the jury in ascertaining what are necessities; but we may venture to state the following rules:—

(a) Evidence being given of the things supplied and of the circumstances of the infant, the court determines whether the things supplied can reasonably be considered necessities at all; and if it comes to the conclusion that they cannot, the case may not even be submitted to the jury.

Things may obviously be incapable of being necessities. A wild animal, or a steam roller, could hardly, under any circumstances, be considered to be such.

Things may be of a useful character, but the quality or quantity supplied may take them out of the character of necessities. Elementary text-books might be a necessary to a student of law, but not a rare edition of ‘Littleton’s Tenures,’ or eight or ten copies of ‘Stephen’s Commentaries.’ Necessaries also vary according to the station in life of the infant or the peculiar circumstances in which he may be placed. The quality of clothing suitable to an Eton boy would be unnecessary for a telegraph clerk; the medical attendance and diet required by an invalid would be unnecessary to one in ordinary health.

It does not follow therefore that, because a thing is of [*117] *a useful class, a judge is bound to allow a jury to say whether or no it is a necessary.¹

16 Vt. 683; professional education, — *Turner v. Gaither*, 83 N. C. 357. These are held generally not to be necessities: services or supplies for the benefit of the estate of the infant, — *Decell v. Lewenthal*, 57 Miss. 331; *House v. Alexander*, 105 Ind. 109; money, — *Randall v. Sweet*, 1 Denio (N. Y.), 460; *Price v. Sanders*, *supra*. Some States by statute exempt students in colleges and academies from liability for necessities. Stimson, Am. St. Law, § 6605.

¹ There is some confusion in the cases on this point, but the following propositions may be justified by authority and on principle: (1) It is for the court to say whether the consideration furnished is

Provinces
of judge
and jury :

(b) If the judge conclude that the question is an open one, and that the things supplied are such as may reasonably be considered to be necessities, he leaves it to the jury to say whether, under the circumstances of the case, the things supplied were necessities as a fact. And the jury determines this point, taking into consideration the character of the things supplied, the actual circumstances of the infant, and the extent to which the infant was already supplied with them. I say 'actual circumstances,' because a false impression which the infant may have conveyed to the tradesman as to his station and circumstances will not affect his liability: if a tradesman supplies expensive goods to an infant because he thinks that the infant's circumstances are better than in fact they are, or if he supplies goods of a useful class not knowing that the infant is already sufficiently supplied, he does so at his peril.

Brayshaw v.
Eaton,
7 Scott, at
p. 187.

Johnstone v.
Marks,
19 Q. B. D.
509.

'It lies upon the plaintiff to prove, not that the goods supplied belong to the class of necessities as distinguished from that of luxuries, but that the goods supplied, when supplied, were necessities for the infant. The fact that the infant was sufficiently supplied at the time of the additional supply is obviously material to this issue as well as fatal to the contention of the plaintiff in respect of it.'¹

of Court of
Appeal.

(c) The ruling of the court and the finding of the jury

ever a necessary for any infant. (2) If it may be a necessary, it is for the court to say whether there is any evidence proper to submit to the jury that it is a necessary in the particular case at bar. The first proposition is applied in distinguishing between articles furnished for the benefit of the person and those furnished for the benefit of the estate of the infant; *Tupper v. Caldwell*, 12 Met. (Mass.) 559; *Decell v. Lewenthal*, 57 Miss. 331; *House v. Alexander*, 105 Ind. 109; though it has been applied in somewhat general terms to personal benefits, as a college education. *Middlebury College v. Chandler*, 16 Vt. 683; *Turner v. Gaiher*, 83 N. C. 357. The second proposition is merely the application of a general rule of procedure. *Rohan v. Hanson*, 11 Cush. (Mass.) 44; *Pyne v. Wood*, 145 Mass. 558.

¹ It is settled law that one who supplies an infant with 'necessaries' acts at his peril. *Trainer v. Trumbull*, 141 Mass. 527, H. & W. 220; *McKanna v. Merry*, 61 Ill. 177.

are alike subject to review by successive courts of appeal.

An infant is liable for wrong: but a breach of contract may not be treated as a wrong so as to make the infant liable; the wrong must be more than a misfeasance in the performance of the contract, and must be separate from and independent of it.¹ Thus where an infant hired a mare to ride and injured her by over-riding, it was held that he could not be made liable upon the contract by framing the action in tort for negligence. Nor can an infant be made liable for goods sold and delivered by charging him in trover and con-*version: and yet [*118] the Infants' Relief Act makes a sale of goods to an infant absolutely void, and would so appear to prevent any property from passing to him.

Infant may not be charged upon contract framed as a tort, Jennings v. Rundall, 8 T. R. 335.

1. Siderfin, 129.

But when an infant hired a horse expressly for riding and not for jumping, and then lent it to a friend who jumped the horse and killed it, he was held liable: for 'what was done by the defendant was not an abuse of the contract, but was the doing of an act which he was expressly forbidden by the owner to do with the animal.'²

but may be for actual tort, though originating in contract. Burnard v. Haggis, 14 C.B., N.S. 45.

A butcher boy appropriated some of the meat which he was employed to carry to his master's customers: he sold it and kept the money. He was detected, an account was made of the money due from him which he acknowledged to be correct, and when he came of age he gave a promissory note for the amount. He was held liable for the amount. It was argued that the liability arose on an account stated, which was void under § 1, or on a

¹ *Eaton v. Hill*, 50 N. H. 233. Whether an infant is liable in tort for a false representation as to his age there is disagreement. *Rice v. Boyer*, 108 Ind. 472; *Nash v. Jewett*, 61 Vt. 501. Some States make such misrepresentation a ground of estoppel to deny the contract. *Stimson*, Am. St. Law, § 6602.

² *Freeman v. Boland*, 14 R. I. 39; *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Towne v. Wiley*, 23 Vt. 355.

In re Seager.
60 L. T. 665.

ratification which was unenforceable under § 2. But the court held that he was liable to an action *ex delicto*, and that his promise to pay when he came of age was the compromise of a suit, for which, being of age he was competent to contract.¹

§ 3. Corporations.

(3) Corporations.

A corporation is an artificial person created by law. Hence the limitations to the capacity of a corporation for entering into a contract may be divided into necessary and express. The very nature of a corporation imposes some necessary restrictions upon its contractual power, and the terms of its incorporation may impose others.

1. Necessary limits to its contractual capacity.

A corporation is an artificial entity, apart from the persons who compose it; their corporate rights and liabilities are something distinct from their individual rights and liabilities, and they do not of themselves constitute the corporation, but are only its members for the time being.

Must contract through an agent.

Ferguson v. Wilson,
2 Ch. 89.

Since then a corporation has this ideal existence apart from its members, it follows that it cannot personally enter into contracts, it must contract by means of an agent. It cannot act in its own person, for it has no person. [*119]

It follows also that a corporation must give some formal evidence of the assent of its members to any legal act which, as a corporation, it may perform. Hence the requirement that a corporation must contract under seal.²

45 & 46
Vect. c. 61.
s. 91.

By the law merchant an instrument under seal is not negotiable, but the Bills of Exchange Act makes an exception in favour of the negotiable instruments of corpora-

¹ *Ray v. Tubbs*, 50 Vt. 688.

² In the United States a corporation need use a seal only where a natural person is required to use one. *Bank of Columbia v. Patterson*, 7 Cranch (U. S.), 299; *Mott v. Hicks*, 1 Cow. (N. Y.) 513; *Hamilton v. Lycoming &c. Co.*, 5 Pa. St. 339.

tions.¹ Before this act a trading corporation whose business it might be to make such instruments could sign them by an agent duly appointed. Their validity must always depend on the capacity of the corporation to make them.²

The express limitations upon the capacity of corporate bodies must vary in every case by the terms of their incorporation. Much has been and still may be said as to the effect of these terms in limiting the contractual powers of corporations, but it is outside the purpose of this book to discuss the doctrine of 'ultra vires.' The question whether the terms of incorporation are the measure of the contracting powers of the corporation, or whether they are merely prohibitory of contracts which are inconsistent with them, was discussed in the much litigated case of the *Ashbury Carriage Company v. Riche*, and the question was thus stated and answered by Blackburn, J.:—

2. Express limitations.

L.R. 7 H.L. 658.

'I take it that the true rule of law is, that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation. For if it were true that a corporation at common law has a capacity to contract *to the extent given it by the instrument creating it and no further*, the question would be, Does the statute creating the corporation by express provision or necessary implication show an in-

¹ A negotiable instrument executed by a corporation under seal is not thereby rendered unnegotiable unless such was the intent of the corporation in affixing the seal. Therefore unless the instrument itself contains a recital as to the seal, or it is shown by extrinsic evidence that the seal was affixed by authority for the purpose of creating a specialty, the negotiable character of the instrument is not affected. *Bank v. Railroad Co.*, 5 S. C. 156; *Mackay v. Saint Mary's Church*, 15 R. I. 121; *Jones v. Homer*, 60 Pa. St. 214; *Weeks v. Esler*, 68 Hun (N. Y.), 518.

² In the United States a corporation has the implied power to make negotiable paper as evidence of any debt which it has authority to contract. *Moss v. Averell*, 10 N. Y. 449; *Comm. v. Pittsburgh*, 41 Pa. St. 278; *Rockwell v. Elkhorn Bk.*, 13 Wis. 731; *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291.

tention in the legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, *as incident to it, a general capacity to contract*, the question is, Does the statute creating the corporation by express *provision or necessary implication show an intention in the legislature to prohibit, and so avoid the making of a contract of this particular kind?' [*120]

In Exch. Ch.
L.R. 9 Exch.
264.

The House of Lords appear not to have dissented from this view of the general powers of corporations, though they placed a different interpretation upon the statute in question, holding that a company incorporated under the Companies Act of 1862 is bound by the terms of its memorandum of association to make no contracts inconsistent with, or foreign to, the objects set forth in the memorandum.¹

Contracts
ultra vires
not void
for ille-
gality, but
for in-
capacity.

A contract made *ultra vires* is void; but not on the ground of illegality. Lord Cairns in the case above cited takes exception to the use of the term 'illegality,' pointing out that it is not the *object* of the contracting parties, but the *incapacity* of one of them, that avoids the contract.²

53 & 54
Vict. c. 62.

The Companies Act of 1890 enables such a company to alter its memorandum under certain conditions and for

¹ "In respect of the power of corporations to make contracts, two propositions may be stated:—(1) That they have, by mere implication of law and without any affirmative expression to that effect in their charters or governing statutes, and of course in the absence of express prohibitions, the same power to make and take contracts, within the scope of the purposes of their creation, which natural persons have; (2) That this power, on the other hand, is restricted to the purposes for which the corporation has been created, and cannot be lawfully exercised by it for other purposes." 4 Thompson on Corp., § 5645, and cases there cited.

² In the United States if either party has had the benefits of a contract *ultra vires*, an action will lie in favor of the other party. The better view is that this liability is quasi-contractual, and that the suit is for benefits conferred, and not on the original contract. *Central Trans. Co. v. Pullman Car Co.*, 139 U. S. 24; *Brunswick Gas Light Co. v. United Gas Fuel & Light Co.*, 85 Me. 532; *Slater Woollen Co. v. Lamb*, 143 Mass. 420, H. & W. 222. Some courts put the decision on the ground of equitable estoppel. *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11.

certain objects. The assent of a court which has jurisdiction to make an order for winding it up, and notice to the parties interested, are the chief conditions. The objects are the furtherance of its business, the addition of cognate business or the abandonment of some of its original objects. Ibid. § 1 (5).

§-4. *Lunatic and drunken persons.*

(4) Lunatic and drunken persons.

The contract voidable:

The contract of a lunatic is binding upon him unless it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing and that the other party knew of his condition.¹

‘When a person enters into a contract and afterwards alleges that he was so insane at the time that he did not know what he was doing and proves the allegation, the contract is as binding upon him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.’ Imperial Loan Co. v. Stone, [1892] 1 Q. B. 601.

This decision enables us to dispense with the distinction whether of lunatic:
 [*121] *between executory and executed contracts made with lunatics which is suggested in *Molton v. Camroux*. 2 Exch. 487; 4 Exch. 17.

¹ The American cases are in great confusion. The following propositions may be regarded as fairly sustained by the weight of authority: (1) Where the sane person does not know of the other person's insanity, and there has been no judicial determination of such insanity, and the contract is so far executed that the parties can not be put *in statu quo*, the contract is binding upon the lunatic. *Gribben v. Maxwell*, 34 Kans. 8, H. & W. 224; *Young v. Stevens*, 48 N. H. 133; *Brodrib v. Brodrib*, 56 Cal. 563; *Copenrath v. Kienby*, 83 Ind. 18. (2) The contract is voidable if the sane person knew of the other's insanity; *Crawford v. Scovell*, 94 Pa. St. 48; or if it has been judicially declared; *Wadsworth v. Sharpsteen*, 8 N. Y. 388; *Carter v. Beckwith*, 128 N. Y. 312; or if the lunatic can be put *in statu quo*. *Burnham v. Kidwell*, 113 Ill. 425. (3) The contract is void if so declared by statute; *Stimson*, Am. St. Law, § 6701; in some States if it be a deed of lands; *Van Deusen v. Sweet*, 51 N. Y. 378; *Brigham v. Fayerweather*, 144 Mass. 48; by high authority if it be a power of attorney; *Dexter v. Hall*, 15 Wall. (U. S.) 9. Some cases recog-

Snook
v. Watts,
11 Beav. at
p. 107.

Hall v. War-
ren, 9 Ves.
605.

ordrunken
person.

Matthews v.
Baxter, L.R.
8 Exch. 132.

A lunatic, so found by commission,^a is not therefore incapable of contracting, but the presumption is very strong in such a case that the contract was not made during a lucid interval, and that the other contracting party was aware of the mental condition of the lunatic.

A contract made by a person in a state of intoxication may be subsequently avoided by him, but if confirmed is binding on him. A man, while drunk, agreed at an auction to make a purchase of houses and land. Afterwards, when sober, he affirmed the contract, and then repented of his bargain, and when sued on the contract pleaded that he was drunk at the time he made it. But the court held that although he had once had an option in the matter and might have avoided the contract, he was now bound by his affirmation of it. 'I think,' said Martin, B. 'that a drunken man, when he recovers his senses, might insist on the fulfilment of his bargain, and therefore that he can ratify it so as to bind himself to a performance of it.'¹

The rules of equity are in accordance with those of

^a Commissions *de lunatico inquirendo* are no longer issued specially in each case of alleged insanity. A general commission is now, by 53 & 54 Vict. c. 5, issued from time to time, under the Great Seal, to Masters in Lunacy appointed by that act, who conduct an inquiry in each case in a manner prescribed by the act.

nize no distinction as to whether the sane person knows of the other's insanity or not. *Seaver v. Phelps*, 11 Pick. (Mass.) 304. If the lunatic becomes sane, he may ratify or disaffirm all voidable contracts; *Arnold v. Richmond Iron Works*, 1 Gray (Mass.), 434; but he may be required to return the consideration. *Boyer v. Berryman*, 123 Ind. 451.

A lunatic is liable in any event for necessities. *Sceva v. True*, 53 N. H. 627; *Sawyer v. Lufkin*, 56 Me. 308. And it would seem that in all cases the courts proceed upon equitable grounds. *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Carter v. Beckwith*, 128 N. Y. 312, 321.

¹ *Barrett v. Buxton*, 2 Aik. (Vt.) 167, H. & W. 228; *Reinskopf v. Rogge*, 37 Ind. 207; *Joest v. Williams*, 42 Ind. 565; *Van Wyck v. Brasher*, 81 N. Y. 260; *Bush v. Breinig*, 113 Pa. St. 310; *Carpenter v. Rodgers*, 61 Mich. 384.

common law in this respect. Under such circumstances as we have described, courts of equity will decree specific performance against a lunatic or a person who entered into a contract when intoxicated, and will on similar grounds refuse to set aside their contracts.

§ 5. *Married Women.*

(5) *Married women.*

(2) *Before 1883 their contracts void. Exceptions.*

Until the 1st of January, 1883, it was true to state that as a general rule, the contract of a married woman was void.¹

Yet there were exceptions to this rule: in some cases a married woman could make a valid contract, but could not sue *or be sued apart from her husband; in [*122] others she could sue but could not be sued alone; in others she could both sue and be sued alone.

(1) A married woman might acquire contractual rights by reason of personal services rendered by her, or of the assignment to her of a *chose in action*. In such cases the husband might 'reduce into possession' rights of this nature accruing to his wife, but unless he did this by some act indicating an intention to deal with them as his, they did not pass, like other personalty of the wife, into the estate of the husband. They survived to the wife if she outlived her husband, or passed to her representatives if she died in his lifetime.²

Grashford v. Buckingham and wife, Cro. Jac. 77. *Dalton v. Mid. Coun. R. Co.* 13 C. B. 478.

(2) The wife of the king of England 'is of capacity to grant and to take, sue and be sued as a *feme sole*, at the common law.'

Co. Litt. 133 a.

(3) The wife of a man *civilter mortuus*^a had similar rights.³

^a Civil death arises from outlawry: it seems doubtful whether there are any other circumstances to which the phrase is now applicable.

¹ Subject to some of the exceptions indicated below, all contracts of married women in this country are absolutely void in the absence of statutory modifications. *Flesh v. Lindsay*, 115 Mo. 1.

² *Miller v. Miller*, 1 J. J. Marsh. (Ky.) 169; *Standeford v. Devol*, 21 Ind. 404; *Pierson v. Smith*, 9 Oh. St. 554.

³ *Metcalf on Cont.*, pp. 83, 84; *Stimson, Am. St. Law*, §§ 2513, 6353.

(4) The custom of the city of London enabled a married woman to trade, and for that purpose to make valid contracts. She could not sue or be sued upon these (except in the city courts) unless her husband was joined with her as a party, but she did not thereby involve him in her trading liabilities.¹

20 & 21 Vict.
c. 85.

(5) A group of exceptions to the general rule was created by the Divorce and Matrimonial Causes Act.²

Divorce,

A woman divorced from her husband is restored to the position of *feme sole*.

Judicial
separation,

Judicial separation, while it lasts, causes the wife 'to be considered as a *feme sole* for the purpose of contract, and wrongs and injuries, and suing and being sued in any judicial proceeding.' §§ 25, 26.

desertion.

And a wife deserted by her husband, and having obtained a protection order from a magistrate or from the court, is 'in the like position with regard to property and contracts, and suing and being sued, as she would be under this act if she had obtained a judicial separation.' § 21.

Contract
for separation.

*(6) Akin to the last exception, though not resting upon statute, is the capacity of a married woman to make a contract with her husband that they should live apart, and to compromise proceedings commenced or threatened in the divorce court. For all contracts incident to such a transaction the wife is placed in the position of a *feme sole*.³ [*123]

McGregor v.
McGregor,
21 Q. B. D.
424.

Separate
estate in
equity.

(7) The *separate estate* of a married woman has in various degrees, in equity and by statute, been treated as a property in respect of which and to the extent of which she can make contracts.

The doctrine arose in the chancery. Property, real and personal, might be held in trust for the separate use of a

¹ For special statutes regulating trading contracts, see Stimson's Am. St. Law, § 6520-3.

² See Stimson, Am. St. Law, §§ 6240-54, 6306-9, 6352-9.

³ *Gaines's Adm'x v. Poor*, 3 Metc. (Ky.) 503.

married woman independent of her husband. Sometimes this property was settled on her with a 'restraint upon anticipation': in such a case she could use the income, but could neither touch the *corpus* of the property, nor create future rights over the income. But where it was not so restrained, then *to the extent of the rights and interests created*, a married woman was treated by courts of equity as having power to alienate and contract.¹

Johnson v. Gallagher, 8 D. F. & J. 494.

But she could not sue or be sued alone in respect of such estate, nor could she bind by contract any but the estate of which she was in actual possession or control at the time the liabilities accrued.

Pike v. FitzGibbon, 17 Ch. D. 454.

The Married Women's Property Acts of 1870 and 1874 specified various forms of property as the separate estate of married women, enabled them to sue for such property and gave them all remedies, civil and criminal, for its protection that an unmarried woman would have had under the circumstances. Under this act a married woman might make a contract for the exercise of her personal skill or labour, and maintain an action upon it in her own name.

Separate estate by statute.

33 & 34 Vict. c. 93.
37 & 38 Vict. c. 50.

Thus was constituted a new legal separate estate, not vested in trustees, and in respect of which a married woman could sue apart from her husband. But this estate was limited in character, and the married woman could not defend alone any *action brought concerning it: [*124] it was necessary that her husband should be joined as a party.

Hancocks v. Lablache, 3 C. P. D. 197.

The Married Women's Property Act of 1882 repeals the acts of 1870 and 1874, except as regards all rights acquired or acts done while those statutes were in force.² It affects: —

(ii) Married Women's Acts.
45 & 46 Vict. c. 75.
1882.

¹ *Jaques v. Methodist Church*, 17 Johns. (N. Y.) 548; *Kantrowitz v. Prather*, 31 Ind. 92.

² Married Women's Property Acts are found in some form in all the American States. The earliest is believed to be that of Missis-

(1) Every woman married after 1882.

(2) Every woman married before 1883 as respects property and *choses in action* acquired after 1882.

We may summarize its effect, so far as it relates to our present purpose, as follows :—

§ 1. sub-s. 1. All property, real and personal, in possession, reversion or remainder, vested or contingent, held by a woman before, or acquired after marriage, is her separate property. She can acquire, hold, and dispose of it by will or otherwise, 'as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee.'

§ 1. sub-s. 2. 'In respect of and to the extent of her separate property' a married woman may enter into contracts, and render herself liable thereupon, as though she were a *feme sole*.

On such contracts she may sue and be sued alone.

56 & 57 Vict.
c. 68.

By the Married Women's Property Act 1893, every contract made by a married woman since December 5, 1893, binds her separate estate, and binds separate estate acquired after the contract was made though she possessed none at the time of making the contract.

§ 1. sub-s. 3.

Leak v.
Driffield, 24
Q. B. D. 98.

The last enactment extends in two ways the operation of the act of 1882. (1) By that act the court might draw inferences as to the intention of a married woman to bind or not to bind her separate estate. Since 1893 the existence of an intention to bind such estate is presumed and cannot be negatived. (2) The act of 1882 had been interpreted to mean that the power of a married woman to

Palliser v.
Gurney, 19
Q. B. D. 519.

issippi in 1839, but the most effective and most widely copied was that of New York, passed in 1848 (L. 1848, c. 200, as amended by L. 1849, c. 375), which, though not repealed, was practically superseded by the act of 1860 (L. 1860, c. 90, as amended by L. 1862, c. 172). For legislation in other States see Stimson, *Am. St. Law*, §§ 6420-22, 6450-60; 1 Parsons on Cont. (8th ed.), pp. 371-82; 2 Bishop on Married Women, §§ 588-829. In some States a married woman is empowered to convey directly to her husband or a husband to his wife. N. Y. L. 1887, c. 537. See *Wells v. Caywood*, 3 Colo. 487, H. & W. 233.

bind her separate estate depended on the existence of such estate at the date of the contract. The amending act, as regards all *contracts made after December 5, [*125] 1893, binds separate estate when acquired, whether or no the married woman possessed any at the date of the contract.¹

Property may be settled upon a married woman in trust, and she may be restrained from anticipation of property so settled, and from rendering it liable in advance to satisfy her contracts.^a

But an unmarried woman possessed of property and debts, cannot upon marriage evade her debts by settling her property upon herself without power of anticipation. Property owned *before* marriage is liable to debts contracted *before* marriage, however the property may be settled *upon* marriage.

Jay v. Robinson, 25 Q. B. D. 467.

On the same principle, where debts are incurred by a married woman on the faith of her separate estate, they bind her estate when coverture has ceased by reason of widowhood or dissolution of marriage.

* An illustration of the nature of this restraint is afforded by the case of *Hood-Barrs v. Cathcart*. A judgment recovered against a married woman who has separate estate which she is restrained from anticipating can only affect such estate as is in her hands at the time: it cannot affect income from such estate, coming into her hands after the date of the judgment. It will be noticed therefore that income arising from separate estate which may not be anticipated does not follow the rule as to after-acquired *free* separate estate, laid down in the act of 1893.

[1894] 2 Q. B. (C. A.) 559.

¹ Under the New York Married Women's Property Acts the conclusion was reached by successive decisions that a married woman's contracts could be enforced against her separate estate in three cases: (1) When created in or about carrying on a trade or business of the wife; (2) when relating to or made for the benefit of her separate estate; (3) when the intention to charge the separate estate was expressed in the instrument or contract by which the liability was created. *Manhattan Brass &c. Co. v. Thompson*, 58 N. Y. 80 (1874). If she had no separate estate or was not carrying on a separate business, she could not contract. *Linderman v. Farquharson*, 101 N. Y. 434. But later legislation has empowered her to contract for all purposes as fully as an unmarried women. See next note.

Liability
of married
woman,

But the liability to which a married woman can thus subject herself possesses some peculiar features.

not
personal.

It is not a personal liability. It cannot come into existence unless there is separate estate, and it does not extend beyond the separate estate. Thus where a joint judgment is given against husband and wife, it is to be given against the husband personally, and against the wife as to her separate property.¹

s. 15.

82 & 83 Vict.
c. 62.

Scott v.
Morley, 20
Q. B. D. 120.

Again, a married woman cannot be made a bankrupt or committed to prison under § 5 of the Debtors' Act 1869, for non-payment of a sum for which judgment has been given against her, under § 1, sub-s. 2 of the act of 1882. The Debtors' Act relates to persons from whom a debt is due, and *damages or costs recovered against a married woman do not constitute a [*126] debt due from her, but 'shall be payable out of her separate estate, and not otherwise.'

§ 1, sub-s. 2.

Holtby v.
Hodgson, 24
Q. B. D. 109.

Pelton v.
Harrison,
[1892] 1 Q. B.
121.

Beyond this a judgment against a married woman 'is precisely the same as a judgment against an unmarried woman.' The judgment is against *her*: 'the fact that execution is limited to her separate property does not make it any the less a judgment against her.'

Results
of the
statute.

Thus the acts of 1882 and 1893 increase in two ways the powers of contracting possessed by a married woman.

Marriage no longer involves any proprietary disability. All the property which a woman owns when she marries

¹ In some American States a married woman is personally liable on all her contracts to the same extent as if unmarried. "A married woman may contract to the same extent, with like effect and in the same form as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate, or otherwise, and in no case shall a charge upon her separate estate be necessary." L. of N. Y. 1884, c. 381. Stimson, Am. St. Law, § 6482. The New York statute excluded contracts between husband and wife. See *Blaechinska v. Howard Mission*, 130 N. Y. 497. But a subsequent statute (L. 1892, c. 594) empowers her to contract with her husband also except as to contracts affecting the

remains hers, and all property which she may subsequently acquire becomes hers, unless it is placed in the hands of trustees with a restraint upon anticipation. The area of separate estate is immensely extended, and therewith the contractual capacity of the woman. Full effect is given to this extension by the provision in the act that future as well as existing separate estate is rendered liable to satisfy the contract.

And the rights and liabilities thus increased are rendered more easy of enforcement by the provision which enables the married woman to sue and be sued alone.¹

marital relation or his liability for her support. The legislation of some other States also permits contracts between husband and wife. Stimson, Am. St. Law, § 6480.

¹ In many States a married woman may sue and be sued without joining her husband. Stimson, Am. St. Law, §§ 6453-4.

CHAPTER IV.

Reality of Consent.

THE next feature in the formation of contract which has to be considered is genuineness or reality of consent; and here the same question recurs in various forms:

Consent: Given an apparent agreement, possessing the element of form or consideration, and made between parties capable of contracting, was the consent of both or either given under such circumstances as to make it no real expression of intention?

vitiating by This question may have to be answered in the affirmative for any one of the following reasons.

mistake, (i) The parties may not have meant the same thing; or one or both may, while meaning the same thing, have formed untrue conclusions as to the subject-matter of the agreement. This is mistake.

misrepresentation, (ii) One of the parties may have been led to form untrue conclusions respecting the subject-matter of the contract by statements innocently made, or facts innocently withheld by the other. This is misrepresentation.

fraud, (iii) These untrue conclusions may have been induced by representations of the other party made with a knowledge of their untruth and with the intention of deceiving. This is fraud.

duress, (iv) The consent of one of the parties may have been extorted from him by the other by actual or threatened personal violence. This is duress.

undue influence. *(v) Circumstances may render one of the parties morally incapable of resisting the will of the other, so that his consent is no real expression of intention. This is undue influence. [*128]

§ 1. *Mistake.*(1) *Mistake.*

The confusion which attends all discussions on mistake makes it important to strike off at once all topics which, though superficially connected with the subject, are not relevant to mistake as invalidating a contract. Mistake of intention differs in effect from

First then we must distinguish mistake of intention from mistake of expression. There are cases where the parties are genuinely agreed, though the terms in which their agreement is expressed will not convey their true meaning. In such cases they are permitted to explain, or the courts are willing to correct their error; but mistake of expression is part of the interpretation of contract.¹ mistake of expression,

Next, we must strike off all cases in which offer and acceptance never agreed in terms, and so there was never the outward semblance of agreement.² want of mutuality,

Thirdly, we must strike off all cases in which the assent of one party has been influenced by a false statement, innocent or fraudulent, made by the other; by violence, or by oppression on the part of the other. false statement,

Lastly, we must strike off all cases in which a man is disappointed as to his power to perform his contract, or in the performance of it by the other. This last topic relates to the performance of contract, and should not be mentioned here, but for a practice, common even to learned and acute writers, of blending mistake and failure of consideration. If a man alleges that a contract to which he was a party has not been performed as he expected, or has altogether failed of performance, the question is not whether he contracted at all, but whether the terms of the contract justify his contention. A man failure of consideration.

Pollock, 465.
Ed. 6.

¹ *Page v. Higgins*, 150 Mass. 27; *Snell v. Atlantic Ins. Co.*, 98 U. S. 85.

² *Rovegno v. Defferari*, 40 Cal. 459, H. & W. 261; *Rupley v. Daggett*, 74 Ill. 351; *Rowland v. New York &c. R.*, 61 Conn. 103; *Greene v. Bateman*, 10 Fed. Cas. 1126.

Failure of
considera-
tion is not
mistake.

who knows with whom he is dealing, and the nature of the contract which he desires to effect, has only himself to blame, if the terms of the contract do not bind the other *party to carry out the objects of agreement, or pay damages for default. And though the terms [*129] may not express what he intended them to express, his failure to find words appropriate to his meaning is not mistake; if it were so a contract would be no more than a rough draft of the intention of the parties, to be explained by the light of subsequent events, and corrected by the court and the jury.

We are bound to assume that the terms of the contract correspond to the intention of the parties. If performance does not correspond to the terms of the contract, or if the subject-matter of the contract, or the conditions under which it has to be performed are not such as the parties contemplated, still we cannot say that the rights of the parties are affected by *mistake*. Every honest man, making a contract, expects that he and the other party will be able to perform and will perform his undertaking. If the disappointment of such expectations were called *mistake*, then mistake would underlie every breach of contract which had not been deliberately intended by the parties before the contract was made.¹

Cases of
operative
mistake.

The cases in which mistake affects contract are exceptions to an almost universal rule that a man is bound by an agreement to which he has expressed a clear assent, uninfluenced by falsehood, violence, or oppression. If he exhibits all the outward signs of agreement the law will hold that he has agreed.

Thus it will appear that operative mistake is very rare, and that the cases of genuine mutual mistake are rarer still. The circumstances under which it is permitted to invalidate a contract arise in one of three ways.

¹ *Rice v. Grange*, 131 N. Y. 149; *Anderson v. May*, 50 Minn. 280, H. & W. 639.

Two parties are brought into contractual relations by the fraud or negligence of a third, inducing one to enter into a transaction which he did not contemplate, or deal with a party unknown or unacceptable to him.

Act of
third
party.

Or again, one of two parties allows the other to agree with him in terms, knowing that the other thinks him to be a different person from what he is, or knowing well that he *attaches one meaning to the terms while [*130] the other party attaches to them another and different meaning.

Dis-
honesty of
one party.

Or lastly, there are cases of genuine mutual mistake where parties contract for a thing which has ceased to exist, or are in error as to the identity of the subject of contract or of one another. These three forms of mistake may be illustrated, though not amply, from the reports. Beyond these the law will not assist people whose judgment leads them astray, unless their judgment was influenced by the fraud or misrepresentation of the other party to the contract. It will be found that the cases which follow fall under one or other of these three heads.

Mistake of
identity or
existence
of subject.

Mistake as to the nature, or as to the existence of the contract.

(i) Mis-
take in-
duced by
fraud of
third party.

It is hard to suppose that this can arise, except from the falsehood or carelessness of a third party. The courts would not permit one who had entered into a contract to avoid its operation on the ground that he did not attend to the terms which were used by himself or the other party, or that he did not read the document containing the contract, or was misinformed as to its contents, or that he supposed it to be a mere form. In like manner one may suppose, though the case has never arisen, that a man who posts a letter of acceptance, which he had written and addressed, would not be excused from

Hunter v.
Walters,
7 Ch. 84.

his contract on the ground that he had changed his mind after writing the letter, and had posted it from inadvertence.

Act of
third
party
fraudu-
lent.

The only cases furnished in the reports are cases in which by the fraud of a third party the promisor had been mistaken as to the nature of the contract into which he was entering, and the promisee has in consequence been led to believe in the intention of the other party to contract when he did not so intend. In *Thoroughgood's Case*, an illiterate man executed a deed, which was described to him as a release of arrears of rent: in fact it was a release of all claims. The deed was not read to him, but when told that it related to arrears of rent, *he said, 'If it be no otherwise, I am content,' and executed the deed. It was held that the deed [*131] was void.

2 Co. Rep. 9.

Illustra-
tion.

In *Foster v. Mackinnon*, Mackinnon who was a very old man was induced to endorse a bill of exchange for £3000, being told that it was a guarantee. The bill was subsequently endorsed for value to Foster, who sued Mackinnon on the bill; the jury found that there was no negligence on the part of Mackinnon, and though Foster was innocent of the fraud, it was held that he could not recover.

'It seems plain on principle and on authority that if a blind man, or a man who cannot read, or who for some reason (*not implying negligence*) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterwards signs; then, *at least if there be no negligence*, the signature so obtained is of no force. And it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that *the mind of the signer did not accompany the signature*; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.'

Foster v.
Mackinnon,
L. R. 4, C. P.
711.

In these two cases it has fallen to the court to say

which of two innocent parties is to suffer for a mistake occasioned by the fraud of a third.¹

The same question arises where the act of the third party is merely officious or careless. It has been held that a man is not bound by an offer wrongly transmitted by a telegraph clerk and accepted by the offeree.² The post office had no authority to convey the message except in the form presented to it. But the question might assume a more difficult aspect.

Officious,
or careless
act.

Henkel v.
Pape, L. R.
6 Exch. 7.

¹ "The party whose signature to such a paper is obtained *by fraud as to the character of the paper itself*, who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included." Dixon, C.J., in *Walker v. Ebert*, 29 Wis. 194, H. & W. 238. See also *De Camp v. Hamma*, 29 Oh. St. 467; *Gibbs v. Linabury*, 22 Mich. 479.

"When a purchaser of a negotiable promissory note takes it for value before maturity without notice of any fraud in its execution, unless at the time it was so purchased by him it was absolutely void, he will recover on such note against the maker, although the maker was induced by fraud to sign it, not intending to sign such a note, but a paper of an entirely different character, and in such case the question of negligence in the maker forms no legitimate subject of inquiry." Johnson, Pres., in *Bank v. Johns*, 22 W. Va. 520, 535.

While the American cases do not generally follow the stringent rule last quoted, they are disposed to turn the equities against the defendant upon slight proof of negligence. *Chapman v. Rose*, 56 N. Y. 137; *Baldwin v. Barrows*, 86 Ind. 351; *Ort v. Fowler*, 31 Kans. 478. And also in cases of innocent purchasers who rely upon documents of title. *Gavagan v. Bryant*, 83 Ill. 376. Where A signs a note for \$195 believing that he is signing one for \$65, query as to whether he can set up any defence against an innocent purchaser for value. *Fayette County Sav. Bk. v. Steffes*, 54 Iowa, 214.

As between the original parties fraud in procuring the contract may always be shown. *Trambly v. Ricard*, 130 Mass. 259. But mere ignorance or mistake on the part of the one signing will not invalidate the contract in the absence of fraud. *Phillip v. Gallant*, 62 N. Y. 256; *Johnston v. Patterson*, 114 Pa. St. 398.

² Accord: *Pepper v. Tel. Co.*, 87 Tenn. 554. Contra: *Western Union Tel. Co. v. Shotter*, 71 Ga. 760. A 'central' telephone operator is held to be the agent of both parties in repeating the conversation. *Oskamp v. Gadsden*, 35 Neb. 7.

A writes to X, a broker, an order to buy certain shares, that is, he makes an offer to buy shares importing a promise to pay their market price. After the letter is written and directed, he receives intelligence which causes him to change his mind, and he takes other letters to the post, leaving this on his table. A servant or a friend, seeing the letter, thinks it has been forgotten, and posts it. The shares are bought just *before a commercial panic, which causes them to fall heavily [*132] in value. Is A or X to lose by the interference of A's friend or servant?

Or suppose that A has given the letter with others to a friend, requesting him to post the others, but only to read the letter to the broker, and advise him upon it. The friend carelessly posts all the letters and the shares are bought at a loss.

It may be said for A in both these cases that the mind of the offeror did not accompany the offer: just as in *Foster v. Mackinnon* the mind of the signer did not accompany the signature. It might be said on X's behalf that A was negligent in his dealings with an important letter, but unless he left it in a place where his letters were usually collected for the post, or dropped it in the street, I find a difficulty in supposing that the mere fact that it lay on his table could furnish an authority to any one to communicate it to X by the post.¹

This much seems clear, that mistake as to the nature of the transaction entered into, or as to the intention of the other party to make a contract, must be mutual mis-

¹ Where A makes and signs a negotiable instrument, but without intending to deliver it, and it is taken from his possession and put into circulation, it has been held that he is liable upon it to a *bonâ fide* holder for value. *Worcester County Bank v. Dorchester &c. Bank*, 10 Cush. (Mass.) 488; *Shipley v. Carroll*, 45 Ill. 285. *Contra*: *Burson v. Huntington*, 21 Mich. 415; *Salander v. Lockwood*, 66 Ind. 285 (*semble*).

take; that it must arise from some deceit which ordinary diligence could not penetrate, or some accident which ordinary diligence could not avert; that it must be brought about by the act of a third party, otherwise the contract, if affected at all, would be voidable for misrepresentation or fraud, and would not be void on the ground of mistake.

Mistake as to the identity of the person with whom the contract is made.

Mistake of this sort can only arise where *A* contracts with *X*, believing him to be *M*: that is, where the offeror has in contemplation a definite person with whom he intends to contract. It cannot arise in the case of general offers, which any one may accept, such as offers by advertisement, or sales for ready money.

(ii) Mistake as to party:

2 H. & N. 564.

known to offeree;

Boulton v. Jones, 2 H. & N. 566.

3 App. Cas. 459.

In *Boulton v. Jones*, Boulton had taken over the business *of one Brocklehurst, with whom Jones had [*133] been used to deal, and against whom he had a set-off. Jones sent an order for goods to Brocklehurst, Boulton supplied them without any notice that the business had changed hands; when Jones learned that the goods had not come from Brocklehurst, he refused to pay for them, and it was held that he need not pay. 'In order to entitle the plaintiff to recover, he must show that there was a contract with himself.' ¹

In *Cundy v. Lindsay*, a person named Blenkarn, by

¹ *Accord: Boston Ice Co. v. Potter*, 123 Mass. 28, H. & W. 243. It would seem that if the goods have been consumed in ignorance of the mistake, the consumer is liable to no one. But if he deals with them after notice of the mistake, he becomes liable either in trover after demand or in assumpsit upon an implied 'ratification' of the substitution of parties. *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184; *Barnes v. Shoemaker*, 112 Ind. 512.

These cases should be carefully distinguished from those where *B* deals with *A*, supposing *A* to be acting for himself, when in fact *A* is acting for an undisclosed principal, *X*. In such case, subject to certain qualifications, *X* may sue or be sued upon the contract. *Hubbard v. Tenbrook*, 124 Pa. St. 291; *Huntington v. Knox*, 7 Cush. (Mass.) 371; Huffcut on Agency, Ch. X.

produced
by fraud
of third
party.

imitating the signature of a respectable firm named Blenkiron, induced *AB* to supply him with goods which he afterwards sold to *X*. It was held that an innocent purchaser could acquire no right to the goods, because as between *AB* and Blenkarn there was no contract.

‘Of him,’ says Lord Cairns, ‘they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind, which could lead to any agreement or contract whatever. As between *him and them there was merely the one side to a contract, where in order to produce a contract, two sides would be required.*’¹

At p. 465.

2 H. & N.
564.

The case of *Boulton v. Jones* is not a case of an offer made by sending goods, and accepted by the use of them. The offer proceeded from the intending purchaser. Boulton knew that it was not addressed to him, but thought that Jones might not care whether Brocklehurst, or Brocklehurst’s successor supplied the goods: as events showed Jones did care, and had reasons for dealing with Brocklehurst, rather than with Boulton.

The result of the two cases is no more than this,—that if a man accepts an offer, which is plainly meant for another, or if he becomes party to a contract by falsely representing himself to be another,^a the contract in either

^a *Cundy v. Lindsay* is a sufficient illustration of the rule which I have laid down: but there is a mass of authority to the effect that where a man induces another to contract with him or to supply him with goods by falsely representing himself to be some one else than he is, or to have an authority which he does not possess, no contract is made, and no property in the goods passes. *Hardman v. Booth*, 1 H. & C. 803; *Kingsford v. Merry*, 1 H. & N. 503; and *Hollins v. Fowler*, L. R. 7 H. L. 757, where all or nearly all the cases bearing on the subject are reviewed.

¹ In a case similar to *Cundy v. Lindsay*, the Massachusetts court, without deciding the point raised in that case, held that the seller had no action against the common carrier who delivered the goods to the imposter. *Samuel v. Cheney*, 135 Mass. 278; *Edmunds v. Merchants’ &c. Co.*, *ib.* 283. But where the imposter represents himself as the

case is void. In *the first case one party takes
[*134] advantage of the mistake, in the other he creates it.

The reports furnish us with no case of genuine mistake, in which *A* makes an offer to *M* believing him to be *X*, and *M* accepts believing the offer to be meant for him.

Cases of mutual error.

If in *Boulton v. Jones* the plaintiff had succeeded a predecessor in business of the same name, he might reasonably have supposed that the order for goods was meant for him. If the order had been given to Boulton (*A*), and accepted by Boulton (*X*), it is very doubtful whether Jones could have avoided the contract on the ground that though he obtained the goods he wanted from the man to whom his order was addressed, the Boulton whom he had addressed was not the Boulton whom he intended to address.

2 H. & N. 564.

Circumstances might indicate to the offeree that the offer was intended for a different person. An offer of marriage falling into the hands of a lady for whom it was not intended, where two ladies chanced to have the same name and address, might or might not be turned into a promise by acceptance, according as the terms of acquaintance, or age of the parties might justify the recipient in supposing that the offer was meant for her. An offer for the purchase of goods might not call for the same nicety of consideration on the part of the offeree.

Mistake as to the subject-matter.

Mistake of identity as to the thing contracted for.

A contract may be void on the ground of mistake, if two things have the same name, and *A* makes an offer to *X* concerning *M*, thinking that *X* is referring to *M*,

(iii) Mistake as to subject-matter.

agent of a reputable merchant, there is no contract and the seller may recover the goods from innocent purchasers. *Barker v. Dinsmore*, 72 Pa. St. 427; *Edmunds v. Merchants' &c. Co.*, *supra*.

(a) Mis-
take of
identity.

which offer *X* accepts concerning *m*, thinking that *A* is referring to *m*. If *there is nothing in the terms of the contract to point to *M*, or *m*, as its subject- [*135] matter, evidence may be given to show that the mind of each party was directed to a different object: that *A* offered one thing, and *X* accepted another.

2 H. & C.
906.

In *Raffles v. Wichelhaus* the defendant agreed to buy of the plaintiff a cargo of cotton 'to arrive *ex Peerless* from Bombay.' There were two ships called *Peerless*, and both sailed from Bombay, but *Wichelhaus* meant a *Peerless* which arrived in October, and *Raffles* meant a *Peerless* which arrived in December. It was held that there was no contract.

Ionides v.
Pacific In-
surance Co.,
L. R. 6 Q. B.
686.

But if *Wichelhaus* had meant a ship of a different name, he would have had to take the consequences of his carelessness in not expressing his meaning properly. Nor could he have avoided the contract if its terms had contained such a description of the subject-matter as would practically identify it.¹

Mistake as to the existence of the thing contracted for.

(b) Mis-
take and
impossi-
bility.

It is doubtful whether this can be regarded as mistake at all, or whether we may not regard the parties to a contract as acting on an assumption or implied condition that the subject-matter of the contract is in existence.^a

The topic really belongs to impossibility of performance: but whereas impossibility arising after the contract is made can only under certain circumstances effect a discharge, antecedent impossibility arising from the non-existence of the thing contracted for prevents the formation of a contract.

5 H. L. C.
673.

In *Couturier v. Hastie*, a contract was made for the sale

^a By 56 & 57 Vict. c. 71. § 6 such a condition is implied in every sale of goods.

¹ *Kyle v. Kavanagh*, 103 Mass. 356, H. & W. 246; *Barton v. Capron*, 3 R. I. 171; *Irwin v. Wilson*, 45 Oh. St. 426.

of a cargo of corn, which the parties supposed to be on its voyage from Salonica to England: it had in fact, before the date of sale, become so heated that it was unloaded at Tunis and sold for what it would fetch. The court held that the contract was void, inasmuch as 'it plainly imports that there was something to be sold, and something to be purchased, whereas the object of the sale had ceased to exist.'¹

[*136] *The same rule applies where parties contract under a mutual belief that a *right* exists, which in fact is non-existent. If *A* agrees with *X* to hire or buy an estate from him which both believe to belong to *X*, but which is found to belong to *A*, the contract will not be enforced. And this is not, as would at first sight appear, an infringement of the maxim '*ignorantia juris haud excusat*.'

Mistake as to existence of a right.

Bingham v. Bingham,
1 Ves. Senr.
126.

'In that maxim,' said Lord Westbury, 'the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake, and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake.'

Cooper v. Phibbs, L.
R. 2 H. L.
170.

¹ *Allen v. Hammond*, 11 Pet. (U. S.) 63; *Gibson v. Pelkie*, 37 Mich. 380, H. & W. 247; *Riegel v. American Life Ins. Co.*, 140 Pa. St. 193; s. c. 153 Pa. St. 134; *Duncan v. New York Mut. Ins. Co.*, 138 N. Y. 88; *Bedell v. Wilder*, 65 Vt. 406; *Sherwood v. Walker*, 66 Mich. 568, H. & W. 249. That mistakes as to quality will not avoid a contract, see *Hecht v. Batcheller*, 147 Mass. 335, H. & W. 255; *Wood v. Boynton*, 64 Wis. 265, H. & W. 257. But there seems to be a class of cases lying midway between mistakes as to existence and mistakes as to quality, where the mistake is as to the existence of some fundamental quality, the presence or absence of which is regarded by the parties as a material element in the contract: as the sterility or non-sterility of a cow, *Sherwood v. Walker*, *supra*; the productiveness or non-productiveness of land, *Irwin v. Wilson*, 45 Oh. St. 426; *Thwing v. Hall & Co.*, 40 Minn. 184; the denominational value of a coin, *Chapman v. Cole*, 12 Gray (Mass.), 141; Pollock on Cont. (6th ed.), p. 465.

*Mistake by one party as to the intention of the other,
known to that other.*

(ir) Mis-
take
coupled
with fraud.

We come here to the limits of operative mistake in regard to the subject-matter of a contract, and must be very careful to define them so as to avoid confusion.

1 Exch. 668.

A general rule laid down in *Freeman v. Cooke*, and often cited with approval, may be taken to govern all cases in which one of two parties claims to repudiate a contract on the ground that his meaning was misunderstood, or that he misunderstood that of the other party.

Smith v.
Hughes, L.
R. 6 Q. B. at
p. 607.

‘If whatever a man’s real intention may be he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.’

As regards the quantity and the price of the subject-matter concerned, a man’s statement must usually be taken to be conclusive against himself.

Responsi-
bilities of
parties.

As regards the quality of a thing sold, or the general circumstances of a contract entered into, a man must use his own judgment, or if he cannot rely upon his judgment, *must take care that the terms of the contract secure to him what he wants.¹ [*137]

In two cases the law will protect one of the parties to a contract.

Rule of
implied
warranty.

Where a man buys goods which he has no opportunity of inspecting, the law introduces into the contract of sale certain implied warranties, that the goods supplied shall correspond in description to the goods promised, and shall be of a marketable character.²

Jones v.
Just, L. R.
8 Q. B. 208.

¹ That *caveat emptor* is the general rule, see *Beninger v. Corwin*, 24 N. J. L. 257; *Wheat v. Cross*, 31 Md. 99.

² So, in some cases, if an inspection would be fruitless. *Wolcott v. Mount*, 36 N. J. L. 262, H. & W. 598; *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159.

And again, in certain contracts said to be ‘uberrimae fidei,’ in which one of the two parties is necessarily at a disadvantage as to knowledge of the subject-matter of the contract, the law requires the other to disclose every material fact, that is, every fact which might have influenced the mind of a prudent person.¹

Rule of
non-dis-
closure.

post, *p. 157.

Beyond this, where the terms of a contract are clear, the question is, not what the parties *thought*, but what they *said* and *did*.

Suppose that *A* sells to *X*, and *X* believes that he is buying, a bar of gold: the bar turns out to be brass. The parties are honestly mistaken as to the subject-matter of the contract, both believed the bar to be gold. But their rights are not affected by their state of mind; they depend on the answer to the question — Did *A* sell to *X* a bar of metal, or a bar of gold? A contract for a bar of gold is not performed by the delivery of a bar of brass; a contract for a bar of metal is performed by the delivery of a bar of metal. It does not matter what the metal may be, nor does it matter what the parties may have thought that it was.²

There are two things which have to be considered by one who is entering into a contract. The first is the quality of the thing, or circumstance of the transaction: the matter of his bargain. The second is the statements, promises, and conditions of which the contract consists: the terms of his bargain. As to these things, and subject to the exceptions which I have mentioned, a contracting party must take care *of himself; he cannot expect [*138] the other party to correct his judgment as to the matter of his bargain, or ascertain by cross-examination whether he understands its terms.

But the law will not allow a man to make or accept a promise, which he knows that the other party understands

¹ *Walden v. Louisiana Ins. Co.*, 12 La. 134, H. & W. 273; *Grigsby v. Stapleton*, 94 Mo. 423, H. & W. 285.

² *Wood v. Boynton*, *supra*; *Chapman v. Cole*, *supra*.

in a different sense from that in which he understands it himself.

Illustrations.

We can best illustrate these propositions by an imaginary sale.

A sells *X* a piece of china.

Mistake as to thing.

(*a*) *X* thinks it is Dresden china, *A* thinks it is not. Each takes his chance. *X* may get a better thing than *A* intended to sell, or a worse thing than he intended to buy; in neither case is the validity of the contract affected.¹

(*β*) *X* thinks it is Dresden china. *A* knows that *X* thinks so, and knows that it is not.

The contract holds. *A* must do nothing to deceive *X*, but he is not bound to prevent *X* from deceiving himself as to the *quality* of the article sold.²

Mistake as to promise.

(*γ*) *X* thinks that it is Dresden china and thinks that *A* intends to sell it as *Dresden* china; and *A* knows it is not Dresden china, but does not know that *X* thinks that he intends to sell it as *Dresden* china. The contract says nothing of Dresden, but is for a sale of china in general terms.

The contract holds. The misapprehension by *X* of the extent of *A*'s promise, unknown to *A*, has no effect. It is not *A*'s fault that *X* omitted to introduce terms which he wished to form part of the contract.³

Mistake as to intention.

(*δ*) *X* thinks it is Dresden china, and thinks that *A* intends to sell it as Dresden china. *A* knows that *X* thinks *he is promising Dresden* china, but does not mean to promise more than china in general terms.

The contract is void. *X*'s error was not one of judgment, as in (*β*), but regarded the intention of *A*, and *A*, knowing that his intention was mistaken, allowed the mistake to continue.⁴

¹ *Wood v. Boynton*, *supra*.

² *Peoples' Bank v. Bogart*, 81 N. Y. 101; *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178, II. & W. 282 (belief as to extrinsic fact).

³ *Wheat v. Cross*, 31 Md. 99.

⁴ *Parrish v. Thurston*, 87 Ind. 437; *Shelton v. Ellis*, 70 Ga. 297, H. & W. 262; *Harran v. Foley*, 62 Wis. 584. These are generally treated as cases of fraud. *Stewart v. Wyoming Ranch Co.*, 128 U. S. 383.

The last instance given corresponds to the rule laid down
 [*139] *in *Smith v. Hughes*. In that case the defendant
 was sued for refusing to accept some oats which he
 had agreed to buy of the plaintiff, on the ground that he
 had intended and agreed to buy old oats, and that those sup-
 plied were new. The jury were told that if the plaintiff
 knew that the defendant *thought he was buying old oats*,
 then he could not recover. But the Court of Queen's
 Bench held that this was not enough to avoid the sale;
 that in order to do so the plaintiff must have known that
 the defendant *thought he was being promised old oats*. It was
 not knowledge of the misapprehension of the *quality* of the
 oats, but knowledge of the misapprehension of the *quality*
promised, which would disentitle the plaintiff to recover.

L. R. 6 Q. B.
597.

Blackburn, J., said, 'In this case I agree that on the sale of a spe-
 cific article, unless there be a warranty making it part of the bargain
 that it possesses some particular quality, the purchaser must take the
 article he has bought though it does not possess that quality.' (This
 is instance *α*.)

Mistake of
 buyer as to
 quality
 not known
 to seller.

'And I agree that even if the vendor was aware that the purchaser
 thought that the article possessed that quality, and would not have
 entered into the contract unless he had so thought, still the purchaser
 is bound, unless the vendor was guilty of some fraud or deceit upon
 him, and that a mere abstinence from disabusing the purchaser of that
 impression is not fraud or deceit; for whatever may be the case in a
 court of morals, *there is no legal obligation on the vendor to inform the*
purchaser that he is under a mistake, not induced by the act of the vendor.'
 (This is instance *β*.)

Mistake of
 buyer as to
 quality
 known to
 seller.

And Hannen, J., said, 'It is essential to the creation of a contract
 that both parties should agree to the same thing in the same sense.
 . . . But one of the parties to an apparent contract may, by his own
 fault, be precluded from setting up that he had entered into it in a
 different sense to that in which it was understood by the other party.
 Thus in a case of sale by sample where the vendor, by mistake, exhi-
 bited a wrong sample, it was held that the contract was not avoided
 by this error of the vendor.' *Scott v. Littledale*.^a (This corresponds to
 instance *γ*.)

Mistake of
 buyer as to
 quality
 promised
 not known
 to seller.

8 E. & B.
815.

^a This case puts, from the seller's point of view, the principle which we
 have been illustrating from the point of view of the buyer. The seller means
 to promise one thing; he in fact promises another; the fact that he thinks he
 is promising something less than he does promise has no effect on the validity
 of the sale.

Mistake of
buyer as to
quality
promised
known to
seller.

And further he says, 'If, in the present case, the plaintiff knew *that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was the apparent, and not the real bargain.' (This corresponds to instance 8.)

Applica-
tion of rule
in equity.

Smith v. Hughes only tells us what is necessary to constitute such mistake as will enable one party successfully to resist an action brought by the other for non-performance of a contract which is not in its terms ambiguous. But a series of equity cases illustrates the rule that when one man knows that another understands his promise in a different sense from that in which he makes it the transaction will not be allowed to stand.

30 Beav. 62.

In *Webster v. Cecil* specific performance of a contract was refused on the ground of mistake of this nature, although it was suggested that damages might be recovered in a common law court for non-performance.

The parties were in treaty for the purchase of some plots of land belonging to Cecil. Webster, through his agent, offered £2000, which was refused. Afterwards Cecil wrote to Webster a letter containing an offer to sell at £1200; he had intended to write £2100, but either cast up the figures wrongly or transposed the first two. Webster accepted by return of post. Cecil at once tried to correct the error, but Webster, though he must have known from the first that the offer was made in mistaken terms, claimed that the contract should be performed and sued for specific performance. This was refused: the plaintiff was left to such action at law as he might be advised to bring. The case was described later as one 'where a person snapped at an offer which he must have perfectly well known to be made by mistake.'

Pér James,
L.J., Tam-
plin v.
James, 15
Ch. D. 221.

Rectifica-
tion in

The power of the Court of Chancery in former times, of the Chancery Division now, to rectify deeds or written in-

struments is as a rule reserved for cases where the parties had agreed and the terms of the agreement, by fault of neither, failed to express their meaning.

Chancery
Division.

[*141] *But it is sometimes used where mistake is not mutual. In such cases, and they are not numerous, one of the parties being at the time cognizant of the other's error as to the nature or extent of his promise seeks to take advantage of it. Or an offer is made in terms which, from the tenor of previous negotiations, the offeree, when he accepts, must know to include more than the offeror meant to include. The court then tells the offeree, in substance, that his agreement must be either rectified or cancelled, and that he may take his choice.

A and *X* signed a memorandum of agreement by which *A* promised to let certain premises to *X* *at the rent of £230, in all respects on the terms of the within lease*: and this memorandum accompanied a draft of the lease referred to. *A*, in filling in the blank in the draft for the amount of rent to be paid, inadvertently entered the figures £130 instead of £230; and the lease was engrossed and executed with this error. The court was satisfied, upon the evidence, that *X* was aware of the discrepancy between the rent which she was promising to pay and the rent which *A* believed her to be promising to pay; and she was given the option of retaining the lease, amended so as to express the real intention of the parties, or giving it up, paying at the rate of £230 per annum for such use and occupation of the premises as she had enjoyed.

Gerrard v.
Frankel,
30 Beav. 445.

Harris v. Pepperell and *Paget v. Marshall* were cases in which the defendant accepted an offer which he must have known to express something which the offeror did not intend to express. The defendant was offered the alternative of cancellation or rectification. In these cases the promise was sought to be set aside, in *Webster v. Cecil* it was sought to be enforced. Otherwise the circumstances are the same.

L.R.5. Eq. 1.
28 Ch. D.
255.

Effects of mistake.

The effect of mistake, where it has any effect at all, is to avoid the contract. The common law therefore offers two remedies to a person who has entered into an agreement void on the ground of mistake. If it be still executory he may repudiate it and successfully defend an action brought *upon it;¹ or if he have paid money under the contract, he may recover it back upon the general principle that 'where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue, an action will lie to recover it back.'²

Kelly v. Solari,
9 M. & W.
58.

Webster v. Cecil,
80 Beav. 62.

Paget v. Marshall,
28 Ch.D. 225.

In equity the victim of mistake may resist specific performance of the contract, and may sometimes do so successfully when he might not have been able to defend at law an action for damages arising from its breach. He may also as plaintiff apply to the Chancery Division of the High Court to get the contract set aside and to be freed from his liabilities in respect of it.³

(2) Misrepresentation.**§ 2. Misrepresentation.****Distinctions.**

In dealing with misrepresentation as a circumstance invalidating contract we must keep before us two distinctions. We must carefully separate misrepresentation or innocent misstatement of fact, from fraud or wilful misstatement of fact: and we must separate with equal care representations, or statements which induce a contract, from terms, or statements which form part of a contract.

With these distinctions in view, we may hope to

¹ *Gibson v. Pelkie*, 37 Mich. 380, H. & W. 247; *Sherwood v. Walker*, 66 Mich. 568, H. & W. 249.

² Recovery of money paid by mistake. *Wood v. Sheldon*, 42 N. J. L. 421; *McGoren v. Avery*, 37 Mich. 120. Recovery of property delivered under contract entered into through mistake. *Rodliff v. Dallinger*, 141 Mass. 1.

³ *Snell v. Atlantic Ins. Co.*, 98 U. S. 85; *Shelton v. Ellis*, 70 Ga. 297, H. & W. 262.

encounter successfully the difficulties which meet us in determining the effect of misrepresentation in contract.

(1) We must, firstly, distinguish misrepresentation from fraud, and must consider whether honesty of motive or ignorance of fact can remove a false statement from the category of fraud.

Misrepresentation and Fraud.

(2) We must, secondly, bear in mind that if a representation forms an integral part of a contract it becomes a promise. If it is false, its untruth does not affect the formation of the contract but operates to give a discharge, or a right of action, or both, to the party injured by the falsehood, such falsehood being in truth the breach of a promise. So we must distinguish representation, [*143] whether innocent or fraudulent, which brings about a contract and so affects its formation, from representation which introduces terms or promises into a contract and so affects its performance. The terminology of this part of the subject is extraordinarily confused. Representation, condition, warranty, independent agreement, implied warranty, warranty in the nature of a condition, are phrases which it is not easy to follow through the various shades of meaning in which they are used.

Statements which are promises and statements which are not.

(3) We must, thirdly, take note of the effect of the Judicature Act, combined with recent decisions, in modifying the rules of common law and expanding those of the chancery in respect of innocent misrepresentations made prior to the formation of a contract.

The law before and since the Judicature Act.

The common law may be said to have attached no weight to a representation unless it was (1) fraudulent, or (2) a term in the contract, or (3) made by way of inducement to enter into a contract, in which, because it belonged to a special class, the utmost good faith and accuracy of statement was required.

Chancery, on the other hand, would refuse specific performance where an innocent misrepresentation could be shown to have induced a contract, though it seems doubtful

whether, except in contracts of the special class alluded to, a contract might be set aside on such grounds.

Effect of
decisions
since the
Judi-
cature
Act.

The Judicature Act, 36 & 37 Vict. c. 66. s. 24. sub-ss. 1 & 2, provides that the High Court of Justice, and the Court of Appeal and every judge thereof, shall give such effect to any equitable claim, remedy or defence as the Court of Chancery ought to have given if the matter had come before it.

The common law rule has therefore been modified by chancery decisions given before the Judicature Act; and not only so, but since the passing of that act a broad rule has been laid down in the Court of Appeal that material misrepresentation, though innocent, affords a ground for relief from the liabilities of a contract into which such a representation *has induced a man to enter. A rule applicable only to special contracts has become [*144] a general rule so far as concerns misrepresentation, while certain contracts are still distinguishable from others in this — that in the making of them the utmost fulness of statement is required.

So we may now say that material misrepresentation is an invalidating circumstance in all contracts, while non-disclosure of fact will only affect contracts of a special sort.

I will deal with these difficulties in order.

(i) Distin-
guished
from fraud.
Fraud as
a wrong.

(1) *Misrepresentation distinguished from fraud.*

The practical test of fraud as opposed to misrepresentation is that one does, and the other does not give rise to an action *ex delicto*. Fraud is a wrong, and may be treated as such, besides being a vitiating element in contract. Misrepresentation may invalidate a contract but will not give rise to an action *ex delicto*, the action of deceit.¹

¹ This distinction is generally observed throughout the United States. *Cowley v. Smyth*, 46 N. J. L. 380; *Da Lee v. Blackburn*, 11 Kans. 190; *Tucker v. White*, 125 Mass. 344; *Wakeman v. Dalley*, 51

‘It must be borne in mind,’ says Cotton, L.J., ‘that in an action for setting aside a contract which has been obtained by misrepresentation, the plaintiff may succeed though the misrepresentation was innocent; but in an action of deceit, the representation to found the action must not be innocent, that is to say it must be made either with a knowledge of its being false or with a reckless disregard as to whether it is or is not true.’

Arkwright
v. Newbold,
17 Ch. D.
320.

But knowledge that a statement is false may not be inconsistent with honesty of motive in making it: on the other hand, there may be no clear knowledge that the statement made is false, but a dishonest or at any rate self-seeking motive for wishing that it should be believed by the party to whom it is made.

Fraud
without
dishonest
motive.

Let us take the first of these cases.

‘It is fraud in law if a party make representations which he knows to be false and injury ensues, although the motives from which the representations proceeded may not have been bad.’

Per Tindal,
C.J., *Foster*
v. *Charles*,
7 Bing. 107.

In *Polhill v. Walter*, Walter accepted a bill of exchange drawn on another person: he represented himself to have [*145] *authority from that other to accept the bill, honestly believing that the acceptance would be sanctioned, and the bill paid by the person for whom he professed to act. The bill was dishonoured at maturity, and an indorsee, who had given value for the bill on the strength of Walter’s representation, brought against him an action

3 B. & A.
114.

N. Y. 27. But in at least two jurisdictions an action for damages will lie for innocent misrepresentations. “The doctrine is settled here, by a long line of cases, that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby, either at law or in equity.” Morse, J., in *Holcomb v. Noble*, 69 Mich. 396; and so also, *Davis v. Nuzum*, 72 Wis. 439. And a few jurisdictions, while denying an independent action in such cases, allow the defendant to set up the damages by way of counterclaim to an action for the price. *Mulvey v. King*, 39 Oh. St. 491; *Loper v. Robinson*, 54 Tex. 510; but see *McIntyre v. Buell*, 132 N. Y. 192; *King v. Eagle*, 10 Allen (Mass.), 548; *First N. Bk. v. Yocum*, 11 Neb. 328.

of deceit. He was held liable, and Lord Tenterden in giving judgment said:—

‘If the defendant, when he wrote the acceptance, and, thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence.’¹

At p. 124.

It will be observed that in this case there was a representation of facts known to be false; that the knowledge of the untruth of the statement was the ground of the decision: it is therefore clearly distinguishable from a class of cases in which it has been held, after some conflict of judicial opinion, that a false representation believed to be true by the party making it will not give rise to the action of deceit.

Derry v.
Peek, 14.
App. Ca. 337.

On the other hand it is not necessary, to constitute fraud, that there should be a clear knowledge that the statement made is false. But statements which are intended to be acted upon, if made recklessly and with no reasonable ground of belief, may furnish such evidence of dishonest motive as to bring their maker within the remedies appropriate to fraud.²

Reckless
misstate-
ment.

Where directors issue a prospectus setting forth the advantages of an undertaking into the circumstances of which they have not troubled themselves to inquire, intending to induce those who read the prospectus to

¹ An action against an agent for an innocent misrepresentation by words or conduct as to his authority, is, in effect, though not always in form, an exception to the general rule that an action for damages will not lie for an innocent misrepresentation. In order to avoid the recognition of the exception, the courts invent the fiction of an “implied warranty of authority” and allow an action for the breach of this warranty. *Kroeger v. Pitcairn*, 101 Pa. St. 311; *White v. Madison*, 26 N. Y. 117; *Huffcut on Agency*, § 183.

² *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, H. & W. 298; *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486; *Bullitt v. Farrar*, 42 Minn. 8.

incur liabilities in respect of the undertaking, they commit a fraud if the statements contained in the prospectus turn out to be untrue; they represent themselves to have a belief which they know they do not possess.

Reese River Mining Co. v. Smith,
L. R. 4 H. L.
64.

And so neither the intent to defraud nor deliberate assertion of untruth are necessary elements in fraud.

[*146] And the best *distinction which we can make between misrepresentation and fraud is that the former is a misstatement of facts not known to be false or a non-disclosure of facts not intended to deceive; while the latter consists in representations known to be false, or made with no real belief in their truth or falsehood, and entitles the injured party to the action of deceit.

(2) *Representations distinguished from terms.*

(22) *Representations distinguished from terms.*

Equally important with the distinction between misrepresentation and fraud is the distinction between statements which are terms in a contract and statements which are inducements to enter into a contract.

Much subtlety of reasoning has been wasted because, where a man has in good faith made a promise which he is ultimately unable to perform, it has been said that his promise was misrepresentation, or was made under a mistake of fact, and so questions proper to the performance or breach of contract have been mixed with questions relating to the formation of contract.

Kennedy v. Panama Steam Co.,
L. R. 2 Q. B.
580.

And other difficulties have arisen from a view at one time entertained by courts of equity, that there may be representations which are not terms in a contract but which ought nevertheless to be made good by the party responsible for them. Such representations, in the cases where they occur, can all be resolved into terms of a contract.^a

Coverdale v. Eastwood,
15 Eq. 121.

^a I touch at the close of this chapter on representation which creates an *estoppel*, and so may prevent the disproof of an alleged right, but this is a different thing from the theory advanced in *Coverdale v. Eastwood*.

We must bear in mind, first, that a representation which is embodied in a contract ceases to be a representation and becomes a promise that a certain thing is or shall be; and next, that, unless a representation is so embodied, it cannot of itself confer any right of action with a view to its realization.

Pollock on
Contract,
507, and
App. N.

At common law if a representation was not part of a contract, its truth, except in the excepted cases and apart *from fraud, was immaterial. If it be part of a contract (and this proposition is still undoubtedly [*147] true) it receives the name of a condition or a warranty, its untruth does not affect the formation of the contract but operates to discharge the injured party from his obligation, or gives him a right of action, *ex contractu*, for loss sustained by the untruth of a statement which is regarded in the light of a promise. We shall get a clearer notion of these various phases of representation from the case of *Behn v. Burness*.

Explanation
in Behn v.
Burness,
3 B. & S.
751.

Action was brought upon a charter party dated the 19th day of Oct. 1860, in which it was agreed that Behn's ship *then in the port of Amsterdam* should proceed to Newport and there load a cargo of coals which she should carry to Hong Kong. At the date of the contract the ship was not in the port of Amsterdam and did not arrive there until the 23rd. When she reached Newport, Burness refused to load a cargo and repudiated the contract, upon which action was brought. The question for the court was whether the words *now in the port of Amsterdam* amounted to a condition the breach of which entitled Burness to repudiate the contract, or whether they only gave him a right, after carrying out the contract, to sue for such damages as he had sustained. Williams, J., in giving judgment in the Exchequer Chamber, thus distinguishes the various parts or terms of a contract:—

Behn v.
Burness,
1 B. & S.
877;
3 B. & S.
753.

‘Properly speaking, a representation is a statement or assertion, made by one party to the other, before or at the time of the contract,

of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; *nor* (with the exception of the case of policies of insurance, at all events, marine policies, which stand on a peculiar anomalous footing) *is such untruth any cause of action, nor has it any efficacy whatever unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. . . .* Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot

Representa-
tion,

fraudu-
lent,

innocent.

alter their *nature. A question however may arise whether a [*148] descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the court and not the jury must determine. If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often-discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages.

Descrip-
tive
statement.

Condition
precedent.

Independ-
ent agree-
ment.

‘In the construction of charter parties, this question has often been raised, with reference to stipulations that some future thing shall be done or shall happen, and has given rise to many nice distinctions. Thus a statement that a vessel is to sail, or be ready to receive a cargo, on or before a given day, has been held to be a condition, while a stipulation that she shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement.

Glabholm v.
Hays,
2 M. & G.
257.
Seeger v.
Duthie,
8 C. B., N. S.
45.
Tarrabochia
v. Hickie,
1 H. & N.
183.

‘But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz. a stipulation by way of agreement, for the breach of which a compensation must be sought in damages.’

The court dealt with the statement that the ship was in the port of Amsterdam at the date of the contract as being intended by the parties to be a condition; and the breach of it was held to discharge the charterer from the obligation to perform his promise.¹

I have cited the judgment of this case at length, partly because it is the fullest judicial analysis of the terms of a contract, partly also because it affords a good illustration of *the provoking confusion of the terminology [*149] of this part of the subject.

Various
senses of
condition
and war-
ranty.

It will be observed that condition is used in two senses, as meaning a statement that a thing is, and a promise that a thing shall be; in either case the statement or promise is of so important a nature that the untruth of the one, or the breach of the other, discharges the contract.

Warranty is used in three senses. It is first made a convertible term with a condition; it is then used 'in the narrower sense of the word,' in which sense it means (1) an 'independent agreement' or subsidiary promise in the contract, the breach of which can only give rise to an action for damages, and (2) a condition, the breach of which might have discharged the contract had it not been so far acquiesced in as to lose its effect for that purpose, though it may still give rise to an action for damages.

Yet in spite of this verbal confusion the judgment gives us a clear idea of the various terms in a contract.

Represen-
tation.

(*α*) *Representations*, made at the time of entering into the contract, but not forming a part of it, may affect its validity in certain special cases, but are otherwise inoperative. When they do operate, their falsehood vitiates the formation of the contract and makes it voidable.

Condition.

(*β*) *Conditions* are either statements, or promises which

¹ *Davison v. Von Lingen*, 113 U. S. 40, H. & W. 265; *Wells, Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 397; *Morrill v. Wallace*, 9 N. H. 113; *Wolcott v. Mount*, 36 N. J. L. 262, H. & W. 598.

form the basis of the contract. Whether or not a term in the contract amounts to a condition must be a question of construction, to be answered by ascertaining the intention of the parties from the wording of the contract and the circumstances under which it was made. But when a term in the contract is ascertained to be a condition, then, whether it be a statement or a promise, the untruth, or the breach of it, will entitle the party to whom it is made to be discharged from his liabilities under the contract.¹

(γ) *Warranties*, used in 'the narrower sense,' are independent subsidiary promises, the breach of which does not discharge the contract, but gives to the injured party a right of action for such damage as he has sustained by the failure of the other to fulfil his promise.²

Warranty
ab initio.

(δ) A *condition* may be broken and the injured party may not avail himself of his right to be discharged, but continue to take benefit under the contract, or at any rate to act as though it were still in operation. In such a case the *condition* sinks to the level of a *warranty*, and the breach of it, being waived as a discharge, can only give a right of action for the damage sustained.³

Warranty
ex post facto.

¹ "A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract." Mr. Justice Gray in *Norrington v. Wright*, 115 U. S. 188, 203, H. & W. 584.

² "A warranty is a separate, independent, collateral stipulation . . . for the existence or truth of some fact relating to the thing sold. It is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase money in the vendor." Shaw, C.J., in *Dorr v. Fisher*, 1 Cush. (Mass.) 271, 273-4.

³ In the United States such conditions are generally termed implied warranties from their inception, and the rule is that the contract may be rescinded for the breach of an implied warranty, but if not re-

(iii) Effects
of misrep-
resenta-
tion.

(iv) Con-
tracts gen-
erally.

(3) *Effects of misrepresentation.*

In order to ascertain the effect of misrepresentation or non-disclosure upon the formation of contract, I propose first to compare the attitude of common law and of equity towards misrepresentation before the Judicature Act, and then to consider how far the provisions of the Judicature Act, interpreted by recent decisions in the Court of Appeal, enable us to lay down in general terms a rule which was previously applicable only to a special class of contracts.

Common
law treat-
ment of
representa-
tion an-
terior to
contract;
10 C.B., N.S.
844.

The case of *Behn v. Burness* shows that in the view of the common law courts a representation was of no effect unless it was either fraudulent, or a term in the contract: the case of *Bannerman v. White* shows that the strong tendency of judicial decision was to bring any statement which was material enough to affect consent, if possible, into the terms of the contract.

Bannerman offered hops for sale to White. White asked if any sulphur had been used in the treatment of that year's growth. Bannerman said 'no.' White said that he would not even ask the price if any sulphur had been used. They then discussed the price, and White ultimately purchased by sample the growth of that year; the hops were sent to his warehouse, were weighed, and the amount due on their purchase was thus ascertained. He afterwards repudiated the contract on the ground that sulphur had been used in the treatment of the hops.

scinded the warranty survives and an action may be brought for the breach. This merely amounts to a difference in nomenclature. *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159; *Wolcott v. Mount*, 36 N. J. L. 262, H. & W. 598. But one or two States hold that in a sale by description, the condition that the goods shall answer the description is solely a condition and will not survive acceptance as an implied warranty; *Coplay Iron Co. v. Pope*, 108 N. Y. 232, H. & W. 597; though the condition that goods shall equal the sample will survive. *Zabriskie v. Central Vt. R.*, 131 N. Y. 72.

[*151] Bannerman sued for their price. It *was proved that he had used sulphur over 5 acres, the entire growth consisting of 300 acres. He had used it for the purpose of trying a new machine, had afterwards mixed the whole growth together, and had either forgotten the matter or thought it unimportant. The jury found that the representation made as to the use of sulphur was not wilfully false, and they further found that 'the affirmation that no sulphur had been used was intended by the parties to be part of the contract of sale, and a warranty by the plaintiff.' The court had to consider the effect of this finding, and held that Bannerman's representation was a part of the contract, a preliminary condition, the breach of which discharged White from liability to take the hops.

Erle, C.J., said:—

'We avoid the term *warranty* because it is used in two senses, and the term *condition* because the question is whether that term is applicable. Then, the effect is that the defendants required, and that the plaintiff gave his *undertaking* that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted; and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used.

Bannerman
v. White,
10 C.B., N.S.
560.

'The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty super-added; or the sale may be conditional, to be null if the warranty is broken. And, upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used: and upon this ground we agree that the rule should be discharged.'

Note that in this case the representation was made before the parties commenced bargaining; whereas the representation in *Behn v. Burness* was a term in the charter party.

Note further that the actual legal transaction between

the parties was an agreement to sell by sample a quantity of hops, a contract which became a sale,^a so as to pass the property, *when the hops were weighed and their price thus ascertained. The contract of sale [*152] contained no terms making the acceptance of the hops conditional on the absence of sulphur in their treatment; and the language of Erle, C.J., shows that he felt it difficult to apply the terms '*condition*' or '*warranty*' to the representation made by the plaintiff.

'The undertaking,' he says, 'was a preliminary stipulation;' and clearly the court felt that its introduction into the contract was only to be effected by an extension of the terms of the contract, so as to include the discussion preliminary to the bargain. What really happened was that Bannerman made a statement to White, and then the two made a contract which did not include this statement, though but for the statement the parties would never have entered on a discussion of terms. The consent of the buyer was, in fact, obtained by a misrepresentation of a material fact, and was therefore unreal, but the common law courts had precluded themselves from giving any effect to a representation unless it was a term in the contract, and so in order to do justice they were compelled to drag into the contract terms which it was never meant to contain.¹

Equitable
treatment
of misrep-
resen-
tation
anterior to
contract.

In considering the principles on which equity has dealt with misrepresentation and non-disclosure of fact we must bear in mind that certain classes of contracts have always been regarded as needing more exact and full statement than others, and that some of these were

^a For the distinction between a sale, and an agreement to sell, see *p. 71 *supra*, and Sale of Goods Act, 1893, 56 & 57 Vict. c. 71. § 1.

¹ *School Directors v. Boomhour*, 83 Ill. 17, H. & W. 271; *Wickham v. Grant*, 28 Kans. 517; *Woodruff v. Saul*, 70 Ga. 271, H. & W. 272. Cf. *Gregory v. Schoenell*, 55 Ind. 101.

of a sort with which the Court of Chancery was more particularly concerned—contracts to take shares in companies—contracts for the sale and purchase of land.

We must also remember that judges in the Court of Chancery never had occasion to define fraud with precision as an actionable wrong. They therefore, not unnaturally, used the term ‘fraudulent’ as applicable to all cases in which they refused specific performance or set aside an instrument on the ground that one of the parties had not acted in good *faith; and somewhat unfortunately they applied it also to representations which were made in good faith though they afterwards turned out to be untrue.

But we find no general rule as to the effect of innocent misrepresentation until 1873, when, in a case precisely similar to *Bannerman v. White*, a similar result was reached by the application of a different principle.

Lamare, a merchant in French wines, entered into negotiations with Dixon for a lease of cellars. He stated that it was essential to his business that the cellars should be dry, and Dixon assured him, to his satisfaction, that the cellars would be dry. He thereupon made an agreement for a lease, in which there was no term or condition as to the dryness of the cellars. They turned out to be extremely damp. Lamare declined to continue his occupation, and the House of Lords refused to enforce specific performance of the agreement, not because Dixon’s statement as to the dryness of the cellars was a term in the contract, but because it was material in obtaining consent and was untrue in fact.

Lamare v. Dixon, L. R. 6 H. L. 414.

Misrepresentation a ground for refusing specific performance,

‘I quite agree,’ said Lord Cairns, ‘that this representation was not a guarantee. It was not introduced into the agreement on the face of it, and the result of that is that in all probability Lamare could not sue in a court of law for a breach of any such guarantee or undertaking: and very probably he could not maintain a suit in a court of equity to cancel the agreement on the ground of misrepresentation. At the same time if the representation was made and if

at p. 428.

that representation has not been and cannot be fulfilled, it appears to me upon all the authorities that that is a perfectly good defence in a suit for specific performance, if it is proved in point of fact that the representation so made has not been fulfilled.'

Thus it appears, that up to the passing of the Judicature Act the Court of Chancery would refuse specific performance of a contract induced by innocent misrepresentation, and that in transactions of certain kinds it was prepared to set contracts aside on the same grounds. The latter remedy had not by express decision been limited to transactions of the kind I have *mentioned, while on the other hand no general rule had been laid [*154] down which might apply to all contracts.

86 & 87 Vict
c. 66, § 24.
sub-s. 1. 2.

The Judicature Act provides that a plaintiff might assert any equitable claim and the defendant set up any equitable defence in any court, and in their treatment of this provision there is no doubt that the court has extended the application of equitable remedies and altered the character of the common law rule. Innocent misrepresentation which brings about a contract is now a ground for setting the contract aside, and this rule applies to contracts of every description.

and for
rescinding
contract.

20 Ch. D. 1.

The case of *Redgrave v. Hurd* was a suit for specific performance of a contract to buy a house. Redgrave had induced Hurd to take, with the house, his business as a solicitor, and it was for misstatement as to the value of this business that Hurd resisted specific performance, and set up a counter-claim to have the contract rescinded and damages given him on the ground of deceit practiced by Redgrave. The Court of Appeal held that there was no such deceit, or statement false to Redgrave's knowledge, as would entitle Hurd to damages; but specific performance was refused *and the contract rescinded* on the ground that defendant had been induced to enter into it by the misrepresentation of the plaintiff.

Growth of
modern
rule.

The law on this subject is thus stated by Jessel, M.R.:—

‘As regards the rescission of a contract there was no doubt a difference between the rules of courts of equity and the rules of courts of common law — a difference which of course has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail. According to the decisions of courts of equity it was not necessary, in order to set aside a contract,^a obtained by material false representation, to prove that the party who obtained it knew at the time that the representation was made that it was false.’

Redgrave v.
Hurd, 20
Ch. D. 12.

In *Newbigging v. Adam* the plaintiff had been induced to enter into a partnership with one Townend by statements made by the defendants who were either the principals or concealed *partners of Townend. The Court of [*155] Appeal held that ‘there was a substantial misstatement though not made fraudulently, which induced the plaintiff to enter into the contract.’

34 Ch. D.
582.

The contract was set aside, and the general rule laid down in *Redgrave v. Hurd* is adopted without qualification or limitation to cases of a particular class. Bowen, L.J., quotes *in extenso* the passage set forth above from the judgment of Jessel, M.R., and says further:—

at p. 592.

‘If the mass of authority there is upon the subject were gone through, I think it would be found that there is not so much difference as is generally supposed between the view taken at common law and the view taken in equity as to misrepresentation. At common law it has always been considered that misrepresentations which strike at the root of a contract are sufficient to avoid the contract on the ground explained in *Kennedy v. Panama, New Zealand and Royal Mail Co.*’

L. R. 2 Q. B.
580.

Now this case was one of cross actions by a shareholder, to recover calls paid, and by a company, to recover calls due. The shareholder contended that he had been induced to take shares on the faith of a statement in the prospectus, which turned out to be untrue; and that this statement was so vital to the contract that its untruth

Comparison of
legal and
equitable
rules.

^a This statement is not quite in accord with Lord Cairns’ view of the rules of equity, as set out on p. 153 in *Lamare v. Dixon*. It has nevertheless become the accepted rule, though it may have been an exaggeration in 1881.

amounted to a total failure of consideration, and entitled him to be discharged from his liability to calls.

The position of the Court of Queen's Bench in this case was very similar to that of the Court of Common Pleas in *Bannerman v. White*. A court of equity might or might not have set the transaction aside on the ground that consent had been obtained by a material misrepresentation made prior to the contract. A court of common law could only deal with the matter by incorporating the representation with the contract, and then asking whether its untruth amounted to a total failure of consideration or the breach of a condition vital to the contract.

10 C. B.,
N. S. 844.

L. R. 2 Q. B.
580.

In *Bannerman v. White* the court held that the representation was a vital condition: in *Kennedy v. Panama Company* the court held that it was not a vital condition. Equity *would give or withhold the same relief, but upon a different and more intelligible principle. [*156]

14 App. Ca.
347.

This principle is clearly stated by Lord Bramwell in *Derry v. Peek*, speaking of the various rights of one who has been injured by the untruth of statements inducing a contract:

Result.

—‘To this may now be added the equitable rule that a material misrepresentation, though not fraudulent, may give a right to avoid or rescind a contract where capable of such rescission.’

Thus a general rule is settled; innocent misrepresentation, if it furnishes a material inducement, is ground for resisting specific performance of the contract or for asking to have it set aside; this relief is of general application, and is not peculiar to the contracts described as *uberrimae fidei*.¹

¹ The view of the author as to equitable relief for innocent misrepresentations is supported by various American authorities. *Wilcox v. Iowa Wesleyan University*, 32 Iowa, 367, H. & W. 268; *Doggett v. Emerson*, 3 Story (U. S. C. C.) 700; s. c. 7 Fed. Cas. 804; *Spurr v. Benedict*, 99 Mass. 463; *Hammond v. Pennock*, 61 N. Y. 145; *Taylor v. Leith*, 26 Oh. St. 428; Bigelow on Fraud, pp. 410-18, where the

But the representation must form a real inducement to the party to whom it is addressed. A mere expression of opinion is not a statement which, if it turns out to be false, invalidates a contract. In effecting a policy of marine insurance the insured communicated to the insurers a letter from the master of his vessel stating that in his opinion the anchorage of the place to which the vessel was bound was safe and good. The vessel was lost there: but the court held that the insured, in reading the master's letter to the insurers, communicated to them all that he himself knew of the voyage, and that the letter was not a representation of fact, but of opinion, which the insurers could act upon or not as they pleased.¹

Express-
sion of
opinion.

Anderson v.
Pacific In-
surance Co.,
L. R. 7 C. P.
65.

Nor are commendatory expressions such as men habitually use in order to induce others to enter into a bargain dealt with as serious representations of fact. A certain latitude is allowed to a man who wants to gain a purchaser, though it must be admitted that the border line of permissible assertion is not always discernible. At a sale by auction land was stated to be 'very fertile and improvable:' it was in fact partly abandoned as useless. This was held to be 'a mere flourishing description by an auctioneer.' But where in the sale of an hotel the occupier was stated
[*157] to be 'a most desirable *tenant,' whereas his rent was much in arrear and he went into liquidation

Commen-
datory ex-
pressions.

Dimmock v.
Hallett, 2 Ch.
at p. 27.

Smith v.
Land &
House Pro-
perty Co.,
28 Ch. D. 7.

learned author says, "The general rule of equity is that . . . any contract may be rescinded for innocent misrepresentation, which was sufficient inducement thereto." But there is strong authority to the effect that equity will interfere by way of rescission only where the "representation was not actually believed by the defendant, on reasonable grounds, to be true." *Southern Development Co. v. Silva*, 125 U. S. 247, 250, where the requisites for rescission are all explicitly stated, though, perhaps, without a keen discrimination between the requisites for equitable relief and the requisites for an action for deceit. And see 2 Pomeroy's Equity Jurisp., § 888; Pollock on Cont. (6th ed.), pp. 503-7.

¹ *Fish v. Cleland*, 33 Ill. 237, H. & W. 288.

directly after the sale, such a statement was held to entitle the purchaser to rescind the contract.¹

(b) Con-
tracts uber-
rimae fidei.

Non-disclosure of material fact. Contracts uberrimae fidei.

There are some contracts in which more is required than the absence of misrepresentation or fraud. These are contracts in which one of the parties is presumed to have means of knowledge which are not accessible to the other, and is then bound to tell him everything which may be supposed likely to affect his judgment. In other words, every contract may be invalidated by material misrepresentation, and some contracts even by non-disclosure of a material fact.

Contracts of marine, fire, and life insurance, contracts for the sale of land, for family settlements, and for the allotment of shares in companies, are of the special class affected by non-disclosure. To these are sometimes added, in my opinion erroneously, contracts of suretyship and partnership.

Marine
insurance.

(a) Contracts of marine insurance.²

In the contract of marine insurance the insured is bound to give to the underwriter all such information as would be likely to determine his judgment in accepting the risk; and misrepresentation or concealment of any such matter, though without fraudulent intention, avoids the policy.

In *Ionides v. Pender* goods were insured upon a voyage for an amount largely in excess of their value; it was held that although the fact of over-valuation would not affect the risks of the voyage, yet, being a fact which

¹ *Tuck v. Downing*, 76 Ill. 71.

² "Every fact and circumstance which can possibly influence the mind of the insurer, in determining whether he will underwrite the policy, or at what premium, is material to be disclosed, and a concealment thereof will vitiate the policy." *Ely v. Hallett*, 2 Caines' Rep. (N. Y.) 57; *Lewis v. Eagle Ins. Co.*, 10 Gray (Mass.), 508; *Hart v. British Ins. Co.*, 80 Cal. 440.

underwriters were in the habit of taking into consideration, its concealment vitiated the policy.

‘It is perfectly well established that the law as to a contract of insurance differs from that as to other contracts, and that a concealment of a material fact, though made without any fraudulent intention, vitiates the policy.’

Per Blackburn, J., in *Ionides v. Pender*, L.R. 9 Q. B. 537.

Nor is the liability of the insured, in this respect, confined to facts within his own knowledge. ‘It is a condition of *the contract,’ said Lindley, L.J., in a *dictum* quoted with approval in the House of Lords, [*158] ‘that there is no misrepresentation or concealment either by the insured or by any one who ought, as a matter of business and fair dealing, to have stated or disclosed the facts to him or to the underwriter for him.’

Blackburn v. Vigors, 17 Q. B. D. (C. A.) at p. 578.

(β) Contracts of fire insurance.¹

Fire insurance.

The description of the premises appears to form a

¹ It may be safe to conclude that the duty to disclose in fire insurance differs from the duty to disclose in marine insurance only in degree and not in kind; and that the difference, such as it is, arises from the better opportunity of the insurer to observe for himself in ordinary fire insurance cases, and, perhaps, from some historical accidents in the development of the doctrine. In the American cases holding that a fire insurance policy is vitiated by an innocent non-disclosure the fact so undisclosed has usually, if not always, been some extrinsic fact which could not have been discovered by an examination of the property, and of so extraordinary a nature that the insurer would not have been likely to inquire concerning it. *Walden v. Louisiana Ins. Co.*, 12 La. 134, H. & W. 273; *Hartford Protection Ins. Co. v. Harmer*, 2 Oh. St. 452; *Burritt v. Saratoga Ins. Co.*, 5 Hill (N. Y.), 188; *Clark v. Ins. Co.*, 8 How. (U. S.) 235. As to those matters that may be discovered by an examination of the property, innocent concealment has no effect; and even innocent misrepresentation may have none where an actual examination is made, or is required by law to be made. *Continental Ins. Co. v. Kasey*, 25 Gratt. (Va.) 268; *Insurance Co. v. Leslie*, 47 Oh. St. 409. It is now usual for insurers to make specific inquiries, and where these are answered correctly, an innocent non-disclosure as to other matters will not affect the policy. *Washington Mills Mfg. Co. v. Weymouth Ins. Co.*, 135 Mass. 503; *Short v. Home Ins. Co.*, 90 N. Y. 16. But an innocent misrepresentation will avoid the policy. *Godard v. Monitor Ins. Co.*, 108 Mass. 56.

New York
Bowery Fire
Insurance
Co. v. New
York Fire
Insurance
Co., 17
Wend. 359.

representation on the truth of which the validity of the contract depends. American authorities go further than this, and hold that the innocent non-disclosure of any material facts vitiates the policy. In an American case, referred to by Blackburn, J., in the judgment above cited, 'the plaintiffs had insured certain property against fire, and the president of the company heard that the person insuring with them, or at least some one of the same name, had been so unlucky as to have had several fires, in each of which he was heavily insured. The plaintiffs reinsured with the defendants, but did not inform them of this. A fire did take place, the insured came upon the plaintiffs, who came upon the defendants. The judge directed the jury, that if this information given to the president of the plaintiff company, was intentionally kept back, it would vitiate the policy of reinsurance. The jury found for the plaintiffs, but the court, on appeal, directed a new trial on the ground that the concealment was of a material fact, and whether intentional or not, it vitiated the insurance.'

L. R. 9 Q. B.
538.

(γ) Contracts of life insurance.

11 Ch. D.
363,

Life in-
surance.

In *The London Assurance v. Mansel* an action was brought to set aside a policy of life insurance on the ground that material facts had been concealed by the party effecting the insurance. He had been asked and had answered questions as follows:—

Has a proposal ever been made on your life at other offices? If so, where?	} Insured now in two offices for £16,000 at ordinary rates. Policies effected last year.
Was it accepted at the ordinary premium or at an increased premium or declined?	

*The answer was true so far as it went, but the defendant had endeavoured to increase his insurance [*159] at one of the offices at which he was already insured, and to effect further insurances at other offices, and in all these cases he had been refused.

The contract was set aside, and Jessel, M.R., thus laid

down the general principle on which his decision was founded.

‘I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases, and though there may be certain circumstances, from the peculiar nature of marine insurance, which require to be disclosed and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principle.’¹

London Assurance Co.
v. Mansel, 11
Ch. D. 367.

But where *A* is effecting an insurance on the life of *X*, and *X* makes false statements as to his life and habits which *A* in good faith passes on to the insurance office, such statements have been held not to vitiate a policy. The ground of the decision was (1) that the statements were not *conditions* on the truth of which the validity of the contract depended, and (2) that *X* was not the agent of *A* for the purpose of effecting the policy, so that the fraud of *X* was not imputable to *A* under the rule that the principal is liable for the fraud of his agent.

Wheelton v.
Hardisty,
5 E. & B.
295.

It is possible that if such a case were to occur since equitable remedies for misrepresentation have become general it might be decided otherwise. It precisely corresponds to the case described in *Redgrave v. Hurd*:^{20 Ch. D. 1.} ‘where a man having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract.’

¹ In a somewhat similar case where there were four interrogatories printed under one number, and the insured answered one of them correctly but did not answer the other three, the Supreme Court of the United States held that by issuing the policy the insurer waived the answers to the other three, distinguishing the case cited by the author, and criticising some portions of that decision. *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183, H. & W. 275. But if there be a misrepresentation, however innocent, it avoids the policy, where by the terms of the policy the answers are made material. *Clemans v. Supreme Assembly &c.*, 131 N. Y. 485; *McCoy v. Metropolitan Ins Co.*, 133 Mass. 82; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519. Cf. *Gray v. National Benefit Assoc.*, 111 Ind. 531.

Sale of
land.

(δ) Contracts for the sale of land.

1 Bing. N. C.
870.

In agreements of this nature a misdescription of the premises sold or of the terms to which they are subject, though made without any fraudulent intention, will vitiate the contract. In *Flight v. Booth*, leasehold property was agreed to be purchased by the defendant. The lease contained restrictions *against the carrying on of several trades, of which the particulars of sale [*160] mentioned only a few; Tindal, C.J., held that the plaintiff could recover back money paid by way of deposit on the purchase of the property.

3 Camp. 285.

Flight v.
Booth,
1 Bing. N. C.
870.

‘We think it is a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such cases the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones v. Edney*, where the subject-matter of the sale was described to be “a free public-house,” while the lease contained a proviso, that the lessee and his assigns should take all their beer from a particular brewery; in which case the misdescription was held to be fatal.’

In re
Fawcett &
Holmes, 42
Ch. D. 156.

Pollock,
519-528.

The Court of Appeal has lately accepted with approval this statement of the law.¹

Equitable remedies however are given subject to the materiality of the misdescription. The purchaser may be entitled to refuse to conclude the sale; or, if the misdescription is a matter of detail, may be compelled to conclude the sale subject to compensation to be made by the vendor.

¹ The American cases are fully in accord upon the effect of a misdescription. *Rayner v. Wilson*, 43 Md. 440; *Stevens v. Giddings*, 45 Conn. 507; *King v. Knapp*, 59 N. Y. 462. But, as stated in the principal case, this is rather because the purchaser does not get what he bargains for, than because the contract is *uberrimae fidei*.

The parties may also provide in the contract of sale for compensation in case of misdescription, and this right, if so expressed, will not merge in the deed of conveyance but may be exercised after the property has passed.

Palmer v. Johnson,
13 Q. B. D.
(C. A.) 351.

(e) Contracts for the purchase of shares in companies.

Purchase of shares influenced by projectors' statements.

The rules with respect to the candour and fulness of statement required of projectors of an undertaking in which they invite the public to join cannot be better stated than in the judgment of Kindersley, V.C., in the case of the *New Brunswick and Canada Railway Company v. Muggeridge*.

1 Dr. & Sn.
at p. 381.

‘Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state [*161] everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.’

These *dicta* are quoted with approval by Lord Chelmsford in *The Venezuela Railway Company v. Kisch*.

L. R. 2 H. L.
at p. 118.

In a later case Lord Cairns points out the distinction between fraud and such non-fraudulent misrepresentation as makes a contract of this nature voidable. He intimates that mere non-disclosure can never amount to fraud unless accompanied with such substantial representations as give a false air to facts, but that ‘it might be a ground in a proper proceeding and at a proper time for *setting aside an allotment or purchase of shares*.’

Peck v. Gurney,
L. R. 6 H. L.
409.

We should distinguish this right of avoidance for non-disclosure, from the remedy in deceit for actual fraud; from the remedy in tort given by the Companies Act against directors for non-disclosure of contracts made by a company or its promoters, and open to persons who take shares on the faith of a prospectus in which such contracts are not set out or referred to; and thirdly from

30 & 31 Vict.
c. 131. § 88.

Sullivan v. Mitcalfe,
5 C. P. D.
(C. A.) 455.

53 & 54 Vict.
c. 64.

the right to compensation given by the Directors Liability Act (1890) to persons who have sustained loss by purchasing shares on the faith of an untrue statement in the prospectus of a company.¹

Surety-
ship is not
uberrimæ
fidei

Suretyship and partnership are sometimes described as contracts needing a full disclosure of all facts which might affect the judgment of the intending surety or partner.

Lee v. Jones,
17 C.B., N.S.
482.

There seems no authority^a for this view; either contract would be invalidated by material though innocent misrepresentation, or by such non-disclosure of a fact as would amount to an implied representation that the fact did not exist; but neither requires the same fulness of disclosure which is *necessary to the contract to sell land or to allot shares. The intending surety [*162] and the intending partner cannot claim the protection accorded to the intending insurer, investor or buyer of land.²

until the
contract is
made:

But when once the contract of suretyship has been entered into, the surety is entitled to be informed of any agreement which alters the relations of creditor and debtor, or any circumstance which might give him a right to avoid the contract. So in *Phillips v. Foxall*, the defendant had guaranteed the honesty of a servant in

L. R. 7 Q. B.
666.

1 R. & M.
150; ib. 182.

^a The only authorities cited in Lindley on Partnerships, p. 303 (ed. 5), are *Hichens v. Congreve* and *Fawcett v. Whitehouse*. But both are cases of actual fraud.

¹ It is held here that the relation of the promoters to those who are induced by them to take stock is one of trust and confidence, and that stockholders may recover damages sustained through the failure of the promoters to disclose all material facts. *Brewster v. Hatch*, 122 N. Y. 349.

² "The rule which prevails in contracts of marine insurance that all material circumstances known to the assured must be disclosed, and that the omission to do so avoids the policy, though the concealment is not fraudulent, does not apply to an ordinary guaranty." *Howe Machine Co. v. Farrington*, 82 N. Y. 121, 126.

the employ of the plaintiff; the servant was guilty of dishonesty in the course of his service, but the plaintiff continued to employ him and did not inform the defendant of what had occurred. Subsequently the servant committed further acts of dishonesty. The plaintiff required the defendant to make good the loss. It was held that the defendant was not liable. Such concealment released the surety from all liability for the subsequent loss. It would seem that if the surety knew that the servant had committed acts of dishonesty which would justify his dismissal, he would be entitled to withdraw his guarantee.¹

Burgess v.
Eve, 13 Eq.
450.

And so with partnership. The relation of partners *inter se* is that of principal and agent, so that one partner can bind the firm in transactions concerning the partnership. Thus, when the contract of partnership has been formed, the utmost good faith is required in the dealings of partners with one another in all that relates to their common business.

nor part-
nership.

Remedies for misrepresentation.

(iv) Reme-
dies.

A statement upon the faith of which one man induces another to contract, may, if it prove to be false, give a right of action for damages in two cases, (1) *ex contractu* if it is a term in the contract, (2) *ex delicto* if it is false to the knowledge of the party making it. But if the statement does not satisfy either of these conditions it can do no more than furnish a defence to an action brought upon the contract, and entitle the injured party

General
rule.

¹ *Roberts v. Donovan*, 70 Cal. 108. A distinct class of contracts *uberrimae fidei* is that where there is an existing fiduciary relation between the parties, as between principal and agent, trustee and ward; it is to this class that the relationship of partners belongs, and it is on this ground that the relationship of promoters to investors is brought within the class requiring the highest good faith. *Brewster v. Hatch*, *supra*.

to take proceedings to get the contract set *aside, subject to such limitations as to rescission as are set forth at the conclusion of the next chapter. The relief thus given may include *an indemnity* 'against the obligations which he has contracted under the contract which is set aside': it cannot include damages for loss sustained.^a

Newbigging
v. Adam, 34
Ch. D. 589.

Excep-
tions.

To this rule that no damages can be obtained for innocent misrepresentation there are three exceptions.

Warranty
of author-
ity.

(a) The first is where an agent in good faith assumes an authority which he does not possess and induces another to deal with him in the belief that he has the authority which he assumes.^{b 1}

Firbank v.
Humphreys,
15 Q. B. D.
62.

30 & 31 Vict.
c. 131. § 38.
Companies
Act.

(b) The Companies Act 1867 requires that a prospectus of a company should contain the date of any contract entered into by the company before the issue of the prospectus and the names of the parties. Otherwise, as between the directors, promoters or officers of the company, and persons who subscribe for shares on the faith of the prospectus, it is fraudulent.

53 & 54 Vict.
c. 61.
Directors'
liability.

(c) The Directors Liability Act 1890 gives a right to any person who has been induced to subscribe for shares in a company by untrue statements in a prospectus, to obtain compensation from the directors for loss sustained, unless they can show that they had reasonable ground to believe the statement and continued to believe it till the shares were allotted, or that the statement was a fair account of the report of an expert or a correct representation of an official document.

3 App. Ca.
1279.

^a The extent of the remedy, and the conditions under which it is granted, are most clearly set forth in the judgment of Lord Blackburn in *Erlanger v. Sombrero Phosphate Co.*

^b See as to this form of liability, Part vi. ch. ii. § 2.

¹ *Kroeger v. Pitcairn*, 101 Pa. St. 311; *Baltzen v. Nicolay*, 53 N. Y. 467; *Farmers' &c. Co. v. Floyd*, 47 Oh. St. 525.

From the cases in which innocent misrepresentation gives rise to a liability in damages we must carefully distinguish the sort of liability which is supported rather than created by *estoppel*.

Estoppel.

‘Estoppel is a rule of evidence,’ and the rule may be stated in the words of Lord Denman:—

‘Where one by his words or conduct wilfully causes another to
[*164] *believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.’

Pickard v.
Sears,
6 A. & E.
469.

Where a defendant is forbidden to disprove certain facts, and where on the assumption that such facts exist the plaintiff would have a right, then estoppel comes in aid of the establishment of the right by preventing the denial or disproof of these facts.¹

But an estoppel can only arise from words or conduct which are clear and unambiguous. This rule, and the effect of estoppel, may be illustrated by the case of *Low v. Bouverie*.

[1891] 3 Ch.
82.

Low was about to lend money to *X* on the security of *X*’s share of a trust fund, of which Bouverie was trustee. He asked Bouverie whether this share was mortgaged or otherwise encumbered, and if so to what extent. Bouverie named such charges as occurred to him but did not name all. In fact the interest of *X* was heavily encumbered, and when the action was brought he was an undischarged bankrupt. Low claimed that Bouverie, the trustee, was liable to make good the loss. The Court of Appeal held (1) that Bouverie’s statement could not be construed as a warranty, so as to bind him by contract to Low; (2) that the statement was not false to his knowl-

¹ *Stevens v. Ludlum*, 46 Minn. 160, H. & W. 280; *Leather Manufacturers’ Bank v. Morgan*, 117 U. S. 96.

edge; (3) that the misrepresentation, being innocent, could not give rise to an action for damages, unless a duty was cast upon Bouverie to use care in statement;^a (4) that no such duty rested upon a trustee, requiring him to answer questions concerning the trust fund to strangers about to deal with the **cestui que trust*; (5) that therefore Bouverie could only be held [*165] liable if he was *estopped* from contending that there were other encumbrances upon the trust fund than those which he had mentioned to Low.

Per Lindley,
L.J., p. 106.

If he had been so estopped he might have been ordered to pay to Low the trust fund, subject only to the encumbrances disclosed in his letters: and, as there were other charges in abundance, he would have had to make good the deficiency out of his own pocket. But the court held that the letters upon which Low sought to make Bouverie liable could not be construed as explicitly limiting the charges on the trust fund to those specified in the letters. 'An estoppel,' said Bowen, L.J., 'that is to say, the language on which the estoppel is founded, must be precise and unambiguous.'

p. 106.

Instances of such precise and unambiguous statement may be found in the cases of companies which issue certificates stating that the holders are entitled to shares. If the certificate is obtained by means of a deposit with the company of a forged transfer of shares, the company

Tomkinson
v. Balkis
Co., [1891]
2 Q. B. 614.

^a The mention of this *duty* would seem to be an excess of judicial caution, for it is hard to see how such a duty could arise so as to give a right of action for *negligent*, as distinct from *fraudulent* misrepresentation. Such a liability may exist in the case of employer and employed, where the person employed acquires and gives information on which the employer will act. But a failure to use due care in the supply of such information would be a breach of the contract of employment, creating a liability *ex contractu* not *ex delicto*. In cases turning on negligent statement, the duty, since *Derry v. Peek*, has been held, in each case, not to exist, and it is probably apart from contract altogether non-existent. See *Angus v. Clifford*, [1891] 2 Ch. 449, and *Le Lievre v. Gould*, [1893] 1 Q. B. 491.

14 App. Ca.
347.

are nevertheless estopped from disputing the title to shares which their certificates confer.

§ 3. *Fraud.*

Fraud is an actionable wrong. As such it is susceptible of fairly precise definition; and as such I treat of it here. Fraud which gives rise to the action of deceit is a very different thing from the sharp practice or unhand-some dealing which would incline a court of equity to refuse the remedy of specific performance, or to grant relief by the cancellation of a contract. It represents the reasoned, logical conclusions of the common law courts as to the nature of the deceit which makes a man liable in damages to the injured party. (3) **Fraud.**

Fraud is a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it.¹ Its essential features.

[*166] *Let us consider these characteristics in detail.

Fraud is a false *representation*.²

(a) **There must be a representation.**

¹ Compare this with the enumeration of elements said to be necessary for rescission as given in *Southern Development Co. v. Silva*, 125 U. S. 247. See also *Hotchkiss v. Third N. Bk.*, 127 N. Y. 329, 337.

² The American courts recognize three distinct classes of cases under this head: (1) Cases where there is an actual false representation; (2) Where there is active or artful concealment, as in *Croyle v. Moses*, 90 Pa. St. 250; (3) Where there is a suppression of truth amounting to a suggestion of falsehood, as explained in *Stewart v. Wyoming Rancho Co.*, 128 U. S. 383, and illustrated in the following cases: *Maynard v. Maynard*, 49 Vt. 297; *Brown v. Montgomery*, 20 N. Y. 287; *Atwood v. Chapman*, 68 Me. 38; *Grigsby v. Stapleton*, 94 Mo. 423, H. & W. 285. It is admitted that the limits of the third class of cases are not clearly defined, and there is much conflict in the application of the doctrine. *Graham v. Meyer*, 99 N. Y. 611. As to the duty to disclose extrinsic facts affecting the transaction, see *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178, and the criticism in *Lapish v. Wells*, 6 Me. 175, 189, and *Paddock v. Strobbridge*, 29 Vt. 470.

It differs here from *non-disclosure* such as may vitiate a contract *uberrimae fidei*; there must be an active attempt to deceive either by a statement which is false, or by a statement not untrue in itself but accompanied with such a suppression of facts as to convey a misleading impression. Concealment of this kind is sometimes called 'active,' 'aggressive,' or 'industrious;' but perhaps the word itself, as opposed to non-disclosure, suggests the active element of deceit which constitutes fraudulent misrepresentation. The distinction between misrepresentation by non-disclosure, which can only affect contracts *uberrimae fidei*, and misrepresentation which gives rise to an action of deceit, is clearly pointed out by Lord Cairns in the case of *Peek v. Gurney*.

L. R. 6 H. L.
p. 408.

'Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time *for setting aside an allotment or a purchase of shares*, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as *that the withholding of that which is not stated makes that which is stated absolutely false*.'

Non-disclosure is
not fraud.

Caveat emptor is the ordinary rule in contract. A vendor is under no liability to communicate the existence even of latent defects in his wares unless by act or implication he represents such defects not to exist.¹

Ward v.
Hobbs,
3 Q. B. D.
(C. A.) 150.
82 & 83 Vict.
c. 70. § 57.

Hobbs sent to a public market pigs which were to his knowledge suffering from typhoid fever; to send them to market in this state was a breach of a penal statute. Ward bought the pigs, 'with all faults,' no representation being made as to their condition. The greater number died: other pigs belonging to Ward were also infected, and so were the stubble-fields in which they were turned out to run. It was contended that the exposure of the pigs in the market amounted to a repre-

¹ *Beninger v. Corwin*, 24 N. J. L. 257.

sensation, under the circumstances, that they were free of *any contagious disease. The case went up to [*167] the House of Lords, where Lord Selborne thus states the law on this point: —

‘Upon the question of implied representation I have never felt any doubt. Such an implication should never be made without facts to warrant it, and here I find none except that in sending for sale (though not in selling) these animals a penal statute was violated. To say that every man is always to be taken to represent in his dealings with other men, that he is not, to his knowledge, violating any statute, is a refinement which (except for the purpose of producing some particular consequence) would not, I think, appear reasonable to any man.’¹

4 App. Ca.
29.

In *Keates v. Lord Cadogan*, the plaintiff sued for damages arising from the defendant’s fraud in letting to the plaintiff a house^a which he knew to be required for immediate occupation, without disclosing that it was in a ruinous condition. It was held that no such action would lie. 10 C. B. 591.

‘It is not pretended,’ said Jervis, C.J., ‘that there was any warranty, expressed or implied, that the house was fit for immediate occupation: but, it is said, that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do, what any man in his senses would do, viz. make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit.’²

^a The house was leased for a term of years. The law is otherwise where a furnished house is hired for a short period, as for instance the London season. In such a case immediate occupation is of the essence of the contract, and if the house is uninhabitable the lessee is discharged, not on the ground of fraud, but because ‘he is offered something substantially different from that which was contracted for.’

Wilson v. Finch-Hatton, 2 Ex. D. 336.

This undertaking as to sanitary condition is extended by the Housing of the Working Classes Act to small tenements of a specified value. 53 & 54 Vict. c. 70. s. 75.

¹ Compare *Grigsby v. Stapleton*, *supra*.

² Accord: *Lucas v. Coulter*, 104 Ind. 81; *Libbey v. Tolford*, 48 Me., 316.

(b) A representation of fact: not of opinion;

Harvey v. Young, 1 Yelv. 20. Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. at p. 243.

nor expression of intention.

Burrell's case, 1 Ch. D. 552.

In *ex parte* Whittaker, 10 Ch. 446.

The representation must be a representation of *fact*.

A mere expression of opinion, which turns out to be unfounded, will not invalidate a contract. There is a wide *difference between the vendor of property saying that it is worth so much, and his saying [*168] that he gave so much for it. The first is an opinion which the buyer may adopt if he will: the second is an assertion of fact which, if false to the knowledge of the seller, is also fraudulent.¹

Again, we must distinguish a representation that a thing is from a promise that a thing shall be: neither a statement of intention nor a promise can be regarded as a statement of fact except in so far as a man may knowingly misrepresent the state of his own mind. Thus there is a distinction between a promise which the promisor intends to perform, and one which the promisor intends to break. In the first case he represents truly enough his intention that something shall take place in the future: in the second case he misrepresents his existing intention; he not only makes a promise which is ultimately broken, but when he makes it he represents his state of mind to be something other than it really is. Thus it has been laid down that if a man buys goods, not intending to pay for them, he makes a fraudulent misrepresentation.²

Again, it is said that misrepresentation of law does

¹ *Gordon v. Butler*, 105 U. S. 553; *Cummings v. Cass*, 52 N. J. L. 77. But the wilful misstatement of an opinion by an expert may constitute fraud. *Conlan v. Roemer*, 52 N. J. L. 53. To say that a building is fire-proof is to state a fact and not an opinion. *Hickey v. Morrell*, 102 N. Y. 454.

² A false statement which is promissory in character is not fraudulent. *Dawe v. Morris*, 149 Mass. 188, H. & W. 292; *Sheldon v. Davidson*, 85 Wis. 138, II. & W. 295. An insolvent purchasing goods knowing he cannot pay for them and concealing his insolvency, is guilty of fraud; but not if he intends to pay for them. *Talcott v. Henderson*, 31 Oh. St. 162; *Devoe v. Brandt*, 53 N. Y. 462; *Hotchkiss v. Third N. Bk.*, 127 N. Y. 329.

not give rise to the action of deceit, nor even make a contract voidable as against the person making the statement. There is little direct authority upon the subject, but it may be submitted that the distinction drawn in *Cooper v. Phibbs* between ignorance of general rules of law and ignorance of the existence of a right would apply to the case of a fraudulent misrepresentation of law, and that if a man's rights were concealed or misstated knowingly, he might sue the person who made the statement for deceit. A decided opinion has been expressed in the Queen's Bench Division, that a fraudulent representation of the effect of a deed can be relied upon as a defence in an action upon the deed.¹

L. R. 2 H. L.
170.

Hirschfield
v. London,
Brighton,
and South
Coast Rail-
way Co.,
2 Q. B. D. 1.

The representation must be made *with knowledge of its falsehood or without belief in its truth.*²

(c) There
must be

¹ A misrepresentation of law is not generally actionable, or in any way remediable, because it is the statement of an opinion, or, at least, it should ordinarily be so understood by the reasonable man. *Fish v. Cleland*, 33 Ill. 237, H. & W. 288; *Duffany v. Ferguson*, 66 N. Y. 482; *Upton v. Tribilcock*, 91 U. S. 45. This general rule is subject to some qualifications. (1) If the parties stand in a fiduciary or confidential relation, a misrepresentation of law may be fraudulent. *Sims v. Ferrill*, 45 Ga. 585. (2) If, although the parties do not stand in a fiduciary relation, the one making the representation has such superior means of knowledge that the one deceived may reasonably rely upon the representation, some courts hold that a misrepresentation of law by which an unconscionable advantage is obtained is fraudulent. *Westervelt v. Demarest*, 46 N. J. L. 37; *Moreland v. Atchison*, 19 Tex. 303; *Cooke v. Nathan*, 16 Barb. (N. Y.) 342. This doctrine is not susceptible of accurate definition and must be cautiously applied. (3) If the representation, although involving a matter of law, can be resolved into a representation of fact, it will be treated as a representation of fact instead of law. *Ross v. Drinkard's Adm'r*, 35 Ala. 434, H. & W. 291; *Burns v. Lane*, 138 Mass. 350. (4) A representation as to a foreign law is a representation of fact. *Bethell v. Bethell*, 92 Ind. 318.

As to relief in equity for mistake as to the existence of private and personal legal rights, see 2 Pomeroy's Eq. Jurisp., § 849.

² (1) No action of deceit will lie where the false statement is made by one believing it to be true; *Cowley v. Smyth*, 46 N. J. L.

knowledge
of false-
hood;

Dickson v.
Reuter's
Telegraph
Co., 8 C. P.
D. 1.

*Unless this is so, a representation which is false gives no right of action to the party injured [*169] by it. A telegraph company, by a mistake in the transmission of a message, caused the plaintiff to ship to England large quantities of barley which were not required, and which, owing to a fall in the market, resulted in a heavy loss. It was held that the representation, not being false to the knowledge of the company, gave no right of action to the plaintiff.¹

p. 5.

'The general rule of law,' said Bramwell, L.J., 'is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it.'

14 App. Ca.
p. 374

This rule is to be supplemented by the words of Lord Herschell in *Derry v. Peek*:—

'First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is

380; *Cowley v. Dobbins*, 136 Mass. 401; *Wakeman v. Dalley*, 51 N. Y. 27; except in Michigan and Wisconsin; *Holcomb v. Noble*, 69 Mich. 396; *Davis v. Nuzum*, 72 Wis. 439. (2) An action will lie where the statement is made by one who knows it to be false or who has no knowledge either of its truth or falsity. *Litchfield v. Hutchinson*, 117 Mass. 195; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, II. & W. 298; *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486; *Dulaney v. Rogers*, 64 Mo. 201; *Haven v. Neal*, 43 Minn. 315. (3) An action will not lie merely because the defendant had no reasonable grounds for his belief; want of reasonable grounds for the belief has only an evidential force. *McKown v. Furgason*, 47 Iowa, 636, H. & W. 301; *Salisbury v. Howe*, 87 N. Y. 128.

¹ The result in the United States is otherwise, though not on the ground of deceit. In this country the one to whom a telegraph message is addressed may generally maintain an action for damages for negligence, although he is not a party to the contract. "While it may be difficult to reply to the criticisms of the grounds upon which the American decisions rest, it must be regarded as settled by an almost unbroken current, that the telegraph company is under responsibility to the sendee, at least in those cases in which injury results from the delivery of an altered message." *Western Union Telegraph Co. v. Allen*, 66 Miss. 549; *New York &c. Co. v. Dryburg*, 35 Pa. St. 298; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256.

proved when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for *one who makes a statement under such circumstances can have no real belief in the truth of what he states.*

or disregard of truth.

Therefore if a man makes a false statement, honestly believing it to be true, he cannot be rendered liable in an action of deceit.

It is fraudulent to represent yourself as possessing a belief which you do not possess. This is the ground of liability in the case of reckless misstatement of fact. The maker of the statement represents his mind as certain in the matter, whereas in truth it is not certain. He says that he believes, when he really only hopes or wishes.

It is just as fraudulent for a man to misrepresent wilfully his state of mind as to misrepresent wilfully any other matter of fact. 'The state of a man's mind,' said Bowen, L.J., 'is just as much a fact as the state of his digestion;' and the rule as **to reckless misstatement* laid down by Lord Herschell does not in any way widen the definition of fraud.

Edgington v. Fitzmaurice, 29 Ch. D. 488.

But from time to time attempts are made to extend the results of fraud, and to make men liable not merely for wilful misstatements of fact or of belief, but for misstatements of fact made in the honest belief of their truth, but not based upon reasonable grounds.

Want of reasonable ground for belief;

The rule was settled in the common law courts, as long ago as 1844, that a misstatement of fact made with an honest belief in its truth was not a ground for an action of deceit, and that 'fraud in law' or 'legal fraud' is a term which has no meaning as indicating any ground of liability.

Collins v. Evans, 5 Q. B. 820.

But shortly after the Judicature Act came into effect judges whose experience had lain chiefly in courts of equity came to deal with the common law action of

deceit, and applied to it from time to time the somewhat ill-defined notions of fraud, which had prevailed in the equity courts." In *Weir v. Bell* the dissenting judgment of Cotton, L.J., contains a *dictum* that a man is liable for deceit, 'if he has made statements which are in fact untrue, recklessly, that is, *without any reasonable grounds for believing* them to be true.'

3 Ex. D. 242.

its effect
doubtful

This view of liability for deceit was not accepted by the majority of the court, and the case is remarkable for an emphatic condemnation by Bramwell, L.J., of the use of the term 'legal fraud:' —

'To make a man liable for fraud, moral fraud must be proved against him. I do not understand legal fraud; to my mind it has no more meaning than legal heat or legal cold, legal light or legal shade.'

1. 243.

Nevertheless in *Smith v. Chadwick* the view of fraud expressed by Cotton, L.J., was adopted and extended by Sir G. Jessel. He there says that a misstatement made care-^{*}lessly, but with a belief in its truth and with no intention to deceive, renders the maker liable to an action for deceit. [*171]

20 Ch. D. 44.

Evidently a confusion was growing up between misrepresentation which is a ground for rescinding a contract, and misrepresentation which is a ground for an action of deceit. The matter came to an issue in *Peek v. Derry*.

till settled
in *Derry v.*
Peek,
14 App.
Ca. 337.

The defendants were directors of a tramway company, which had power by a special act to make tramways, and with the consent of the Board of Trade to use steam power to move the carriages. In order to obtain the special act the plans of the company required the approval of the Board of Trade, and the directors assumed, that as their plans had been approved by the Board before their act was passed, the consent of the Board to the use of steam power,

* Thus Sir E. Fry (*Specific Performance*, p. 324) speaks of fraud as including 'not only misrepresentation when fraudulent, but also *all other unconscionable or deceptive dealing of either party to any contract.*'

which they had to obtain after the act was passed, would be given as of course. They issued a prospectus in which they called attention to their right to use steam power, as one of the important features of their undertaking. The consent of the Board of Trade was refused: the company was wound up, and a shareholder brought an action of deceit against the directors.

Stirling, J., found as a fact that the defendants 'had reasonable grounds for the belief' expressed in the prospectus, and that they were innocent of fraud. The Court of Appeal held that although the prospectus expressed the honest belief of the directors, it was a belief for which no reasonable grounds existed, and that the directors were therefore liable. The House of Lords reversed the decision of the Court of Appeal. The cases are exhaustively discussed in the judgment of Lord Herschell, and the conclusion to which he comes is thus expressed:—

Peek v.
Derry, 37
Ch. D. 541,
565.

'In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed, though on insufficient grounds. . . . At the same time, I desire to say distinctly that when a false statement has been made, the questions

Absence of
reasonable
ground for
belief not
a cause of
action,

[*172] whether there were reasonable grounds for believing it,* and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one.'

Derry v.
Peek, 14
App. Ca.
375.

The rule may therefore be regarded as settled that a statement made with an honest belief in its truth cannot render the maker liable for deceit,^a though the absence of reasonable grounds for belief may go to show that the

but may
suggest
dishonest
motive.

^a It is stated on high authority that a representation, believed to be true when made, but afterwards discovered to be false, amounts to fraud if the transaction is allowed to continue on the faith of it. If this means that an action of deceit would lie, there must be something said or done confirmatory of the statement after it is known to be false.

Lord Blackburn in
Brownlie v.
Campbell,
5 App. Ca.
p. 950.

belief expressed was not really entertained, in other words that the man who made the statement represented himself to possess a belief which he did not possess.

It may well happen in the course of business that a man is tempted to assert for his own ends that which he wishes to be true, which he does not know to be false but which he strongly suspects to have no foundation in fact. If he asserts such a thing with a confident assurance of belief, or if he neglects accessible means of information, his statement is not made in an honest belief of its truth; he may have taken care not to acquaint himself with inconvenient facts.

‘But *Peek v. Derry* has settled once for all the controversy which was well known to have given rise to very considerable difference of opinion as to whether an action for negligent misrepresentation, as distinguished from fraudulent misrepresentation, could be maintained.’

Angus v. Clifford,
[1891] 2 Ch.
C. A. 468.

Dishonest
motive
need not
be present,
p. 144.

L. R. 6 H. L.
409.

if state-
ment
known to
be false.

There is another aspect of fraud in which the fraudulent intent is absent but the statement made is known to be untrue. Such is the case of *Polhill v. Walter*, cited above. That decision is confirmed by the judgment of Lord Cairns in *Peek v. Gurney*. The plaintiff in that case had purchased shares from an original allottee on the faith of a prospectus *issued by the directors of a company, and he brought an action of deceit against the directors. Lord Cairns compared the statements in the prospectus with the circumstances of the company at the time they were made, and came to the conclusion that the statements were not justified by facts. He then proceeded to point out that though these statements were false, yet the directors might well have thought, and probably did think, that the undertaking would be a profitable one. [*173]

‘But,’ he says, ‘in a civil proceeding of this kind all that your Lordships have to examine is the question, Was there or was there not misrepresentation in point of fact? And if there was, however inno-

cent the motive may have been, your Lordships will be obliged to arrive at the consequences which would properly result from what was done.'

There is good reason for such a rule: if a man chooses to assert what he knows or even suspects to be false, hoping, perhaps believing, that all will turn out well, he cannot be permitted to urge upon the injured party the excellence of the motives with which he did him a wrong, but must submit to the natural inferences and results which follow upon his conduct.¹

The representation must be made *with the intention that it should be acted upon by the injured party.* (d) Made with intention that it be acted upon by injured party.

We may divide this proposition into two parts. (1) The representation need not be made to the injured party; (2) it must be made with the intention that he should act upon it.

(1) Levy sold a gun to the father of Langridge for the use of himself and his sons, representing that the gun had been made by Nock and was 'a good, safe, and secure gun:' Langridge used the gun; it exploded, and so injured his hand that amputation became necessary. He sued Levy for the false representation, and the jury found that the gun was unsafe, was not made by Nock, and found generally for the plaintiff. It was urged, in arrest of judgment, that Levy could not be liable to Langridge for a representation not made to him; but the Court of Exchequer held that, since *the gun was sold to the father to be used by [*174] his sons, and the false representation made in order to effect the sale, and as

Langridge v. Levy, 2 M. & W. 519.
The statement need not be made to the injured party,

'there was fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.' ²

p. 582.

¹ *Judd v. Weber*, 55 Conn. 267.

² This class of cases, based on *deceit*, should not be confounded with those anomalous cases based on the doctrine of sending immi-

L. R. 6 H. L.
p. 377.

but must
be made
with the
intention
that he
should act
upon it.

(2) In *Peek v. Gurney* directors were sued by persons who had purchased shares in a company on the faith of false statements contained in a prospectus issued by the directors. The plaintiffs were not those to whom shares had been allotted on the first formation of the company; they had purchased their shares from such allottees. It was held that the prospectus was only addressed to the first applicants for shares; that the intention to deceive could not be supposed to extend to others than these: and that on the allotment 'the prospectus had done its work; it was exhausted.'

L. R. 6 H. L.
p. 410.

The law had been so stated in an earlier case.

Barry v.
Croskey,
2 J. & H. 1.
p. 22.

'Every man must be held responsible for the consequences of a false representation made by him to another upon which a third person acts, and so acting is injured or damnified, *provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss.* . . . But to bring it within the principle, the injury, I apprehend, must be the immediate and not the remote consequence of the representation thus made.'¹

(e) **Must
actually
deceive.**

The representation *must actually deceive*.

Arkwright
v. Newbold,
17 Ch. D.
324.

'In an action of deceit the plaintiff cannot establish a title to relief simply by showing that the defendants have made a fraudulent statement: he must also show that he was deceived by the statement and acted upon it to his prejudice.'

Horsfall v.
Thomas,
1 H. & C. 90.

Thomas bought a cannon of Horsfall. The cannon had

nently dangerous articles *negligently* into the market. *Thomas v. Winchester*, 6 N. Y. 397; *Schubert v. Clark Co.*, 49 Minn. 331. Nor with those cases generally in which the defendant is held to have undertaken a duty wider than contract and to have performed it negligently. *Ante*, p. 208, note 1; *Savings Bank v. Ward*, 100 U. S. 195, 205-6.

The doctrine as applicable to deceit is illustrated by representations to a commercial agency which mislead patrons of the agency; *Eaton v. Avery*, 83 N. Y. 31; *Stevens v. Ludlum*, 46 Minn. 160, H. & W. 280; or to a trustee of a bond issue which mislead those purchasing from the trustee. *Nash v. Minnesota &c. Co.*, 159 Mass. 437.

¹ *Hunnewell v. Duxbury*, 154 Mass. 286, H. & W. 303.

a defect which made it worthless, and Horsfall had endeavoured to conceal this defect by the insertion of a metal plug into the weak spot in the gun. Thomas never inspected the gun; he accepted it, and upon using it for the purpose for which he bought it the gun burst. It was held that the attempted fraud, having had no operation upon his mind, did not *exonerate him from paying [*175] for the gun. 'If the plug, which it was said was put in to conceal the defect, had never been there, his position would have been the same; for, as he did not examine the gun or form any opinion as to whether it was sound, its condition did not affect him.' This judgment has been severely criticised by high authority, but it seems to be founded in reason. Deceit which does not affect conduct cannot create liabilities; and it would seem as reasonable to defend an action brought for the price of goods on the ground that the seller was a man of immoral character, as to maintain that a contract was voidable by reason of a deceit practised by one party but in no way affecting the judgment of the other.¹

Per Bramwell, B.
1 H. & C. 99.

See dicta of Cockburn, Smith v. Hughes, L. R. 6 Q. B. at p. 605.

Deceit which does not deceive is not fraud.

We may now consider *the effect of fraud* such as we have described it to be, upon rights *ex contractu*.

Effects of fraud.

Apart from contract, the person injured by fraud, such as we have described, has the common law action for deceit, and may recover by that means such damage as he has sustained; an analogous remedy exists in equity where the plaintiff would otherwise, as in cases of fraud by directors, have to bring a number of separate actions of deceit, or would for some reason be destitute of legal remedy. These remedies are not confined to fraud as affecting the formation of contract; they apply to any fraudulent statement

Remedies *ex delicto*.

Peck v. Gurney, L. R. 6 H. L. at p. 390.

Barry v. Croskey, 2 J. & H. 30.

¹ *Slaughter's Adm'r v. Gerson*, 13 Wall. 379; *Sheldon v. Davidson*, 85 Wis. 138, H. & W. 295; *Long v. Warren*, 68 N. Y. 426; (cf. *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40; *Schumaker v. Mather*, 133 N. Y. 590); *Lewis v. Jewell*, 151 Mass. 345, H. & W. 306.

which leads the person to whom it is made to alter his position for the worse.

But we have to consider fraud and its effects in relation to contract. We must therefore ask what are the remedies *ex contractu* open to one who finds that he has been induced to enter into a contract by fraud.

Remedies
ex con-
tractu.

1. He may affirm the contract and ask for a fulfilment of its terms or damages for such loss as he has sustained by their non-fulfilment.

He cannot, however, enforce a fulfilment of the terms of the contract unless the false statement by which he has been deceived is of such a character as to take effect by way of *estoppel. The nature of the liability which may arise from the application of this rule of evidence [*176] has been explained elsewhere, and is not limited to cases in which the relations of the parties originated in contract.^a

ante, p. 164.

In like manner one who has been induced to purchase a chattel by fraud may retain the chattel and sue for loss sustained by the fraud.

But the exercise of this right must depend on the nature of the contract. A man cannot remain a shareholder and sue the company of which he is a member, though he was induced to purchase shares by the fraud of the directors. Nor can he divest himself of the character of a shareholder, and so put himself in a position to sue, after the company has gone into liquidation.

Houlds-
worth v.
City of
Glasgow
Bank, 5
App. Ca.
317.

Right of
rescission.

2. He may avoid the contract, either by taking active steps to get it cancelled in the Chancery Division on the ground of fraud, or by resisting a suit for specific performance, or an action for damages brought in respect of it.

3. If after becoming aware of the fraud he does not

L. R. 18 Eq.
661.

^a In a previous edition I cited *Moore and De la Torres* case as an illustration of the right of the defrauded person to have the false statement fulfilled. But I believe that if that case were to be decided now it would be decided on the ground of estoppel.

give notice of his intention to avoid the contract, he may lose his option to affirm or avoid the contract, and may be thrown back upon the action for deceit.

This loss of his right to affirm or avoid may accrue — firstly, if he takes any benefit under the contract or does any act which amounts to an affirmation of it.¹

Limits of
right to
rescind.

Or secondly, if before he makes his choice circumstances have so altered that the parties can no longer be replaced in their former position. Such would be the case of a shareholder induced to take shares by false statements in a prospectus, if the company should go into liquidation before he can disaffirm.²

Oakes v.
Turquand,
L. R. 2 H. L.
325.

Or thirdly, since the contract is voidable, not void, — is valid until rescinded, — if third parties *bonâ fide* and for value acquire *property or possessory rights in goods [*177] obtained by fraud, these rights are valid against the defrauded party.³

Rights of
third
parties.

Babcock v.
Lawson, 4
Q.B. D. 394.

There is now but one exception to this rule.

If the fraud take the form of personation; if *A* obtains goods from *X* by falsely representing himself to be *C* or *C*'s agent, and then sells the goods to *M*, *M* acquires no title though he is ignorant of the fraud and has paid for the goods.⁴

Cundy v.
Lindsay,
3 App. Ca.
459.
Hollins v.
Fowler,
L. R. 7 H. L.
757.

By 24 & 25 Vict. c. 96, s. 100, if goods were obtained by false pretences, the title of the defrauded owner re-vested in him if the swindler was prosecuted to conviction.

Bentley v.
Vilmont,
12 App. Ca.
471.

¹ "The invariable rule is that the right to rescind may be exercised upon discovery of the fraud; but any act of ratification of a contract, after knowledge of the facts authorizing a rescission, amounts to an affirmation, and terminates the right to rescind." *Crooks v. Nippolt*, 44 Minn. 239; *Bach v. Tuch*, 126 N. Y. 53.

² "A court of equity is always reluctant to rescind, unless the parties can be put back in *statu quo*." *Grymes v. Sanders*, 93 U. S. 55; *Bassett v. Brown*, 105 Mass. 551.

³ *Rowley v. Bigelow*, 12 Pick. (Mass.) 307; *Dettra v. Kestner*, 147 Pa. St. 566.

⁴ *Barker v. Dinsmore*, 72 Pa. St. 427.

tion by or on behalf of the owner, and he might recover them from an innocent purchaser for value. The Sale of Goods Act, 56 & 57 Vict. c. 71, s. 24 (2) overrides this provision. The title to goods thus obtained does not revert upon conviction, though the convicting court may make an order for their restitution.

Charter v.
Trevelyan,
11 Cl. & F.
714.

Lapse of time has of itself no effect in determining the rights of the defrauded party. But lapse of time coupled with knowledge of the fraud may furnish evidence of intention to affirm, and will in any event increase the chance that by change in the position of the parties or the acquisition of rights by a third party the right to rescind may be lost.

Clough v.
L. & N.W.R.
Co., L. R. 7
Ex. 35.

(4) Duress.

§ 4. *Duress.*

In what it
consists.

A contract is voidable at the option of one of the parties if he have entered into it under duress.

Duress consists in actual or threatened violence or imprisonment; the subject of it must be the contracting party himself, or his wife, parent, or child; and it must be inflicted or threatened by the other party to the contract, or else by one acting with his knowledge and for his advantage.¹

1 Rolle, Abr.
638.

Must
affect
promisor,
Huscombe v.
Standing,
Cro. Jac. 187.
See ante,
p. 84.

A contract entered into in order to relieve a third person from duress is not voidable on that ground; though a simple contract, the consideration for which was the discharge of a third party by the promisee from an illegal imprisonment, would be void for unreality of consideration.

Atlee v.
Backhouse,
8 M. & W.
633.
and must
be per-
sonal.

Nor is a promise voidable for duress which is made in *consideration of the release of goods from detention. If the detention is obviously wrongful the [*178] promise would be void for want of consideration;² if the

¹ *Morse v. Woodworth*, 155 Mass. 233, H. & W. 308; *Brown v. Pierce*, 7 Wall. (U. S.) 205; *Adams v. Irving Nat. Bk.*, 116 N. Y. 606; *Morrill v. Nightingale*, 93 Cal. 452.

² *Tollhurst v. Powers*, 133 N. Y. 460, H. & W. 174.

legality of the detention was doubtful the promise might be supported by a compromise. But money paid for the release of goods from wrongful detention may be recovered back in virtue of the quasi-contractual relation created by the receipt of money by one person which rightfully belongs to another.¹

See post,
Quasi-Contract.

§ 5. *Undue influence.*

I have mentioned that this use of the term Fraud has been wider and less precise in the chancery than in the common law courts. This followed necessarily from the remedies which they respectively administered. Common law gave damages for a wrong, and was compelled to define with care the wrong which furnished a cause of action. Equity refused specific performance of a contract, or set aside a transaction, where one party had acted unfairly by the other. Thus 'fraud' at common law is a false statement such as is described in the preceding section: 'fraud' in equity has often been used to mean unconscientious dealing.

(5) **Undue influence:**

arises from a course of conduct or circumstances or the relations of the parties; not from definite statement.

One form of such dealing is commonly described as the exercise of 'undue influence.' The subject can only be dealt with here in outline. Whether or no relief is granted in any given case must often depend on the view taken by the court of the character or tendency of a number of transactions extending over a considerable time.

But we must find a definition of undue influence before we proceed to consider and classify the circumstances which create it, and we may find assistance towards this process of classification in certain principles which equity judges have laid down as to the enforcement of promises or gifts made for no consideration or for a consideration wholly disproportionate to the value of the thing promised or given.

Definition of undue influence.

¹ *Loneragan v. Buford*, 148 U. S. 581.

Lord Selborne supplies a definition in *The Earl of Aylesford v. Morris*. Speaking of the cases ‘which, in the language of *Lord Hardwicke, raise from the circumstances and conditions of the parties contracting [*179] a presumption of fraud,’ he says:—

Presump-
tion of
undue
influence

‘Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable.’

The principles to which I alluded are these:—

Kekewich v.
Manning, 1
D. M. G. 188.

(a) that equity will not enforce a gratuitous promise even though it be under seal;

Hoghton v.
Hoghton, 15
Beav. 299.

(β) that the acceptance of a voluntary donation throws upon the person who accepts it the necessity of proving ‘that the transaction is righteous;’

Wood v.
Abrey,
8 Maddock,
423.

(γ) that inadequacy of consideration is regarded as an element in raising the presumption of undue influence or fraud;

Coles v.
Trecothick,
9 Ves. 246.

(δ) but that mere inadequacy of consideration will not (according to the strong tendency of judicial opinion) amount to proof of either.

So the question which we have to discuss may be put thus:—When a man demands equitable remedies, either as plaintiff or defendant, seeking to escape or avoid a grant or promise made gratuitously or upon a very inadequate consideration, what must he show in addition to this in order to raise the presumption that undue influence has been at work?

from in-
equality
of parties:

We must first ask whether the parties were upon equal terms as to knowledge and capacity in respect of the transaction. They cannot be so if one is in present need or is uneducated or inexperienced.

‘In ordinary cases each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of “the expectant heir,” or of persons under pressure without adequate protection, and in the case of dealings with uneducated, *ignorant persons, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract.’

O'Rourke v.
Bolingbroke,
2 App. Ca.
at p. 828.

Such persons were formerly protected in two modes which are no longer available. Usury laws avoided promises to pay interest beyond a certain rate per cent., and thus prevented extortionate loans of money.¹ And the Court of Chancery adopted a rule that the purchaser of a reversionary interest might always be called on to show that he had given full value for his bargain, and thus a man was protected against the risk that the pressure of poverty might compel him to take an inadequate sum for the prospects of future wealth.

The usury laws are repealed, and the rule framed by the Court of Chancery is set aside by 31 & 32 Vict. c. 4. But a catching bargain or an exorbitant rate of interest is none the less liable to be set aside by the Chancery Division where two parties deal on unequal terms as to age, knowledge, or position. Such a transaction is assumed to be unfair unless the party who has received benefit is able to show that it is in fact fair and reasonable.²

Where the party who seeks redress is of full capacity, has been within reach of good advice, and is in no such immediate want as would put him at the mercy of an unscrupulous speculator, the exercise of undue influence will not be assumed; it must be proved, and this proof is supplied if it is shown that the donor understood what he

from
special
relation:

Hoghton v.
Hoghton,
15 Beav. 299.

¹ For usury laws see Stimson, Am. St. Law, §§ 4830-37; 3 Parsons on Cont. (8th ed.), p.* 153.

² For a discussion of the principles governing the cases where one party is incapacitated by his mental condition or necessities from giving a real consent, see 2 Pomeroy, Eq. Jurisp., §§ 944-54.

was doing. But where certain relations, parental or confidential, exist between the parties, a presumption of influence arises unless it be proved that the donor or promisor has been '*placed in such a position as will enable him to form an entirely free and unfettered judgment independent altogether of any sort of control.*'

Archer v. Hudson,
7 Beav. 560.

parental;

The court will not necessarily set aside a gift or promise made by a child to its parent, by a client to his solicitor, by a patient to his medical man, by a *cestui que trust* to his trustee, by a ward to his guardian, or by any person to

spiritual;

his *spiritual adviser; but such relations call for proof that the party benefited did not take advantage

[*181]

14 Vesey,
273.

of his position. As was said by Lord Eldon in *Huguenin v. Baseley*, where a lady made over her property to a clergyman in whom she reposed confidence,

'The question is not whether she knew what she was doing, had done, or proposed to do, but how that intention was produced: whether all that care and providence was placed around her, as against those who advised her, which from their situation, and relation in respect to her, they were bound to exert on her behalf.'

p. 800.

The law as laid down by Lord Eldon has been followed in a long series of decisions, of which one of the latest is *Bainbrigge v. Browne*, where a transaction between a father and children was set aside on the ground that the father had failed to show, as he was bound to do, that his children had independent advice in the matter, and full knowledge of the contents of the documents which they were signing.

18 Ch. D.
196.

Tate v. Williamson,
2 Ch. 55.

fiduciary.

Nor is it enough that independent advice should be secured for the person subject to the influence arising from fiduciary relations. A knowledge of any material fact possessed by the buyer or donor and withheld by him is sufficient to vitiate the transaction.

Where no
presump-
tion, in-
fluence

Where there are no such relations between the parties as give rise to a presumption of influence, the burden of proof rests on the donor or promisor to show that undue

influence was, in fact, exercised. If this can be shown the courts will give relief. may be proved.

‘The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the Court of Equity most ordinarily deals are those of trustee and *cestui que trust*, and such like. It applies specially to those cases, for this reason and for this reason only, *that from those relations the court presumes confidence put and influence exerted*. Whereas in all other cases where those relations do not subsist, the confidence and *the influence must be proved extrinsically*; but where they are proved extrinsically, the rules of reason and common sense and the technical rules of a court of equity are just as applicable in the one case as the other.’

Smith v.
Kay,
7 H. L. C.
779.

[*182] *The words quoted are those of Lord Kingsdown: the case was one in which a young man, only just of age, had incurred liabilities to the plaintiff by the contrivance of an older man who had acquired a strong influence over him, and who professed to assist him in a career of extravagance and dissipation. It was held that influence of this nature, though it certainly could not be called parental, spiritual, or fiduciary, entitled the plaintiff to the protection of the court.

Similar in character is the recent case of *Moreley v. Loughnan*, an action brought by executors to recover money paid by the deceased to a man in whose house he had lived for some years. Wright, J., in giving judgment for the plaintiffs, said that it was unnecessary to decide whether a fiduciary relation existed between the deceased and Loughnan, or whether spiritual influence had determined the gifts. ‘The defendant took possession, so to speak, of the whole life of the deceased, and the gifts were not the result of the deceased’s own free will, but the effect of that influence and domination.’¹

[1898] 1 Ch.
786.

¹ For a discussion of the principles governing the cases where the parties are in a fiduciary relation, see 2 Pomeroy, Eq. Jurisp., §§ 955–63; Bigelow on Fraud, pp. 261 *et seq.* See also *Hall v. Perkins*, 3 Wend. (N. Y.) 626; *Leighton v. Orr*, 44 Iowa, 679; *Connor v. Stanley*, 72 Cal. 556; *Cowee v. Cornell*, 75 N. Y. 91.

Rescission. The right to rescind contracts and to revoke gifts made under undue influence is similar to the right of rescinding contracts induced by fraud. Such transactions are voidable not void. So soon as the undue influence is withdrawn, the action or inaction of the party influenced becomes liable to the construction that he intended to affirm the transaction.

Presumed affirmation
8 Q. B. D.
587. Thus in *Mitchell v. Homfray* a jury found as a fact that a patient who had made a gift to her physician determined to abide by her gift after the confidential relation of physician and patient had ceased, and the Court of Appeal held that the gift could not be impeached.

36 Ch. D.
145. In *Allcard v. Skinner* the plaintiff allowed five years to elapse before she attempted to recall gifts made to a sisterhood from which she had retired at the commencement of that time; during the whole of the five years she was in communication with her solicitor and in a position to know and exercise her rights. In this case also the Court of Appeal held *that the conduct of the donor [183] amounted to an affirmation of the gift.

depends on cessation of influence. But the affirmation is not valid unless there be an entire cessation of the undue influence which has brought about the contract or gift. The necessity for such a complete relief of the will of the injured party from the dominant influence under which it has acted is thus set forth in *Moxon v. Payne*:—

8 Ch. 881.

‘Fraud or imposition cannot be condoned; the right to property acquired by such means cannot be confirmed in this court unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and *an absolute release from the undue influence by means of which the frauds were practised.*’

The same principle is applied where a man parts with a valuable interest under pressure of poverty and without proper advice. Acquiescence is not presumed from delay: on the contrary, ‘it is presumed that the same distress which pressed him to enter into the contract prevented him from coming to set it aside.’

In re Fry,
40 Ch. D.
at p. 324.

CHAPTER V.

Legality of Object.

THERE is one more element in the formation of contract which remains to be considered — the object of the parties. Certain limitations are imposed by law upon the freedom of contract. Certain objects of contract are forbidden or discouraged by law; and though all other requisites for the formation of a contract be complied with, yet if these objects are in contemplation of the parties when they enter into their agreement the law will not enforce it.

Two matters of inquiry present themselves in respect of this subject. The first is the nature and classification of the objects regarded by law as illegal. The second is the effect of the presence of such objects upon the contracts in which they appear.

Two subjects of inquiry:
(1) the nature,
(2) the effects of illegality.

§ 1. NATURE OF ILLEGALITY IN CONTRACT.

The objects of contract may be rendered illegal by express statutory enactments or by rules of common law. And the rules of common law may be more or less precisely defined.

(1) What is illegality?

We may arrange the subject in the following manner:—

A contract may be illegal because

(1) its objects are forbidden by statute;

(2) its objects are defined by the common law as constituting an indictable offence or civil wrong;

(3) its objects are discouraged by the common law as contrary to public policy.

[*185] *But the two latter heads of illegality are in fact two forms, one more and one less precise, of com-

mon law prohibition. The broad distinction is between contracts illegal by statute and contracts illegal at common law, and it is thus that I propose to treat the subject.

(i) *Contracts which are made in breach of statute.*

(i) Statutory illegality.

(a) Effects of statutory prohibition.

A statute may declare that a contract is illegal or void. There is then no doubt of the intention of the legislature that such a contract should not be enforced. The difference between an *illegal* and a *void* contract is important as regards collateral transactions, but as between the parties the contract is in neither case enforceable.

But a statute may impose a penalty on the parties to a contract, without declaring it to be either illegal or void.

In such a case we have to ascertain whether the legislature intended merely to discourage the contract by making it expensive to both parties; or to avoid it, so that parties would acquire no legal rights under it; or to prohibit it, so that any transactions entered into for its furtherance would be tainted with an illegal purpose.

If the penalty was imposed for the protection of the revenue, it is possible that the contract is not prohibited, that the legislature only desired to make it expensive to the parties, in proportion as it is unprofitable to the revenue.¹

Brown v.
Duncan,
10 B. & C. 93.

Cope v.
Rowlands,
2 M. & W.
158.

Smith v.
Mawhood,
14 M. & W.
464.

The soundness of this distinction has however been called in question. A better test is to be found in the continuity of the penalty. If the penalty is imposed once for all, and is not recurrent on the making of successive contracts of the kind which are thus penalised, or if other circumstances would make the avoidance of the contract a punishment disproportionate to the offence, it may be argued that such contracts are not to be held void. But where the penalty recurs upon the making of every con-

¹ *Larned v. Andrews*, 106 Mass. 435.

tract of a certain sort, we may assume (apart from revenue cases, as to which there may yet be a doubt) that the contract thus penalised is avoided as between *the [*186] parties. Whether it is rendered illegal, so as to taint collateral transactions, must be a question of the construction of the statute.¹

I will not discuss here in any detail the various statutes by which certain contracts are prohibited or penalised. They relate (1) to the security of the revenue; (2) to the protection of the public in dealing with certain articles of commerce, (3) or in dealing with certain classes of traders; (4) to the regulation of the conduct of certain kinds of business. An excellent summary of statutes of this nature is to be found in the work of Sir

(b Objects of statutory prohibition.

¹ "While, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly." *Pangborn v. Westlake*, 36 Iowa, 546, H. & W. 315, where a statute imposing a penalty for the sale of each and every lot in any addition to a city unless the plan of such addition was duly recorded, was held not to render such sales illegal. It will be observed that this case escapes the test proposed by the author. There are many other American cases where statutes penalizing or even forbidding certain transactions have been construed to the same effect. *Harris v. Runnels*, 12 How. (U. S.) 79; *Wheeler v. Hawkins*, 116 Ind. 515, 520; *National Bank v. Matthews*, 98 U. S. 621; *Niemeyer v. Wright*, 75 Va. 239.

The following statutes have been construed as rendering contracts made without compliance with the statute void: requiring a license as a condition precedent to engaging in a specified vocation, *Gardner v. Tatum*, 81 Cal. 370 (physician); *Hiltson v. Browne*, 3 Colo. 304 (lawyer, cf. *Harland v. Lilienthal*, 53 N. Y. 438); *Buckley v. Humason*, 50 Minn. 195 (broker); *Wells v. People*, 71 Ill. 532 (public school teacher); requiring weights and measures to be sealed as a condition precedent to sale of goods by merchant, *Bisbee v. McAllen*, 39 Minn. 143; cf. *Eaton v. Kegan*, 114 Mass. 433; requiring goods to be inspected, labelled, or stamped, *Baker v. Burton*, 31 Fed. Rep. 401; *Braun v. Keally*, 146 Pa. St. 519.

Pollock,
704, ed. 6.

F. Pollock, and it is not proposed to deal further with them here.¹

(c) Illus-
trations.

Wagering
contracts.

There is however a kind of contract, the wager, which needs special attention. Its peculiar character calls for analysis, and the modes in which it has been dealt with by the legislature require to be traced. Confusion has arisen from the use of the word 'wager' as a term of reproach; hence some contracts not permitted by law have been called wagers, while others, precisely similar in their nature but enforced by the courts under certain conditions, are not so called.

What is a
wager?

A wager is a promise to give money or money's worth upon the determination or ascertainment of an uncertain event; the consideration for such a promise is either something given by the other party, or a promise to give upon the event determining in a particular way.^{a 2}

^a It would seem that to constitute a wager there must be mutual chances of gain and loss. A so-called bet of £— to nothing might be an offer of reward for the exercise of skill, as if *X* should bet his jockey £100 to nothing that he did not win a race which *X* desired to win; or it might be a gratuitous promise to pay money on a condition, as if *X* should bet £5 to nothing that it rained in 24 hours.

¹ The construction of the "Sunday statutes" which are in force in most of the American States has resulted in some conflict of authority. These statutes commonly prohibit work, labor, and business on Sunday. In such cases a contract to perform work or labor on Sunday is illegal. *Handy v. St. Paul Globe Publishing Co.*, 41 Minn. 188, H. & W. 318. Is a contract made on Sunday, but to be performed on a secular day, also illegal? This depends upon whether the courts construe the making of a contract to be work, labor, or business; some courts do, *Reynolds v. Stevenson*, 4 Ind. 619, H. & W. 322; *Cranston v. Goss*, 107 Mass. 439; *Costello v. Ten Eyck*, 86 Mich. 348; *Troewert v. Decker*, 51 Wis. 46; some courts do not, *Merritt v. Earle*, 29 N. Y. 117; *Moore v. Murdock*, 26 Calif. 514; *Richmond v. Moore*, 107 Ill. 429. Those courts that do, except the making of a contract for a charitable purpose; *Bryan v. Watson*, 127 Ind. 42; *Allen v. Duffie*, 43 Mich. 1; but they are not agreed as to whether there can be a subsequent ratification on a secular day. *Adams v. Gay*, 19 Vt. 358; *Day v. McAllister*, 15 Gray (Mass.), 433. Of course the phraseology of a particular statute may be decisive. See generally Ringgold, *Law of Sunday* (1891); Greenhood, *Public Policy*, pp. 546–66.

² The force of the second part of the above definition is well illus-

The event may be uncertain because it has not happened, or because it is not ascertained, at any rate to the knowledge of the parties. Thus a wager may be made upon the length of St. Paul's, or upon the result of an election which is over, though the parties do not know in whose favour it has gone. The uncertainty then resides in the minds of the parties, and *the subject of the [*187] wager may be said to be rather the accuracy of each man's judgment than the determination of a particular event.

But the parties must contemplate the determination of the uncertain event as the sole condition of their contract. One may thus distinguish a genuine wager from a conditional promise or a guarantee.^{a 1}

If *A* promises to paint a portrait of *X* and *X* promises to pay £100 if *M* approves the likeness — this is a contract for the sale of a chattel, the payment to depend upon a condition. *A* agrees to do a piece of work, for which he is to be paid in the uncertain event of *M*'s approval. it differs from conditional promise:

If *A*, wishing to be sure that he gets something, promises *D* to pay him £20 if *M* approves, in considera-

^a The definition of a wagering contract cited by Professor Holland, in the French Code, seems faulty. It is said to be 'one the effects of which, as to both profit and loss whether for all the parties or for one or several of them, depend on an uncertain event.' This would include any agreement in which the profit and loss of one party depended on a contingency. Jurisprudence. 259, ed. 5. Art. 1964.

trated in cases where premiums or prizes are offered to successful competitors in contests of skill, speed, etc. It is generally held that such transactions are not wagers, although the competitors pay an entrance fee which goes to make up the purse, provided they are not the sole contributors and the transaction is not a subterfuge to cover a wager. *Porter v. Day*, 71 Wis. 296; *Harris v. White*, 81 N. Y. 532; *Alvord v. Smith*, 63 Ind. 58; *Delier v. Plymouth &c. Soc.*, 57 Iowa, 481.

¹ *A* and *B* agreed to exchange property on terms to be fixed by *X*, and if either refused to abide by *X*'s decision, he should pay the other ten dollars. *A* refused to abide by the decision. It was held that the agreement was one for liquidated damages for breach of contract and not a wager. *Parsons v. Taylor*, 12 Hun (N. Y.), 252.

tion that *D* promises to pay *A* £10 if *M* does not approve — this is a wager on the uncertain event of *M*'s decision. *A* bets *D* 2 to 1 that *M* does not approve.

and
guarantee.

Again, if *A* desires *X* to advance £500 to *M*, and promises that if at the end of three months *M* does not pay he will — this is a promise to answer for the debt or default of another.

If *A*, wishing to secure himself against the possible default of *M*, were to promise *D* to pay him £100 if *M* satisfied his debt at the end of three months, in consideration that *D* promised him £250 if *M* did not satisfy his debt — this would be a wager upon the solvency of *M*.

Marine in-
surance is
a wager,

It is obvious that a wager may be a purely gambling or sporting transaction, or it may be directed to commercial objects. A man who bets against his horse winning the Derby is precisely in the same position as a man who bets against the safety of his own cargo. Yet we call the one a wager, while the other is called a contract of marine insurance. *A* has a horse likely to win the Derby, and therefore *a prospect of a large return for money laid out in rearing and training the horse, in stakes and in bets; he wishes to secure that he shall in no event be a loser, and he agrees with *X* that, in consideration of *X* promising him £4000 if his horse loses, he promises *X* £7000 if his horse wins. [*188]

though
there be
'insurable
interest.'

The same is his position as owner of a cargo: he has a prospect of large profits on money laid out upon a cargo of silk; he wishes in no event to be a loser, and he agrees with *X*, an underwriter, that in consideration of his paying *X* £—, *X* promises to pay him £— if his cargo is lost by certain specified perils.

The law forbids *A* to make such a contract unless he has what is called 'an insurable interest' in the cargo, and contracts in breach of this rule have been called mere wagers, while those which conform to it have been called contracts of indemnity. But such a distinction is mislead-

ing.^a It is not that one is and the other is not a wager: a bet is not the less a bet because it is a hedging bet; nor yet because the stake is limited to the amount of loss sustained; it is the fact that one wagering contract *is* and the other *is not permitted by law* which makes the distinction between the two.

A life insurance is in like manner a wager. Let us compare it with an undoubted wager of a similar kind. *A* is about to commence his innings in a cricket match, and he agrees with *X* that if *X* will promise to give him £1 at the end of his innings, he will pay *X* a shilling for every run he gets. *A* may be said to insure his innings as a man insures his life; for the ordinary contract of life insurance consists in this, that *A* agrees with *X* that if *X* will promise to pay a fixed sum on the happening of an event which must happen sooner or later, *A* will pay to *X* so much for every year that elapses until the event happens. In each of these cases *A* *sooner or later [*189] becomes entitled to a sum larger than any of the individual sums which he agrees to pay. On the other hand, he may have paid so many of these sums before the event takes place that he is ultimately a loser by the transaction.

Life insurance is a wager.

We may leave here the analysis of a wager, and look at the history of the law respecting wagering contracts.

History of the common law as to wagers;

They fall into two groups: wagers on the happening or ascertainment of an uncertain event, made entirely for sport; and wagers in which the uncertain event affects or results from a business transaction—in other words, hedging bets by which a man protects himself from a trade risk.

I will first deal with sporting wagers, premising that at common law all wagers were enforceable, and, until

^a In *Wilson v. Jones* such a distinction is drawn by Willes and Blackburn, J.J. But though the *propriety* of a wager may be affected by the existence of an ulterior object in the mind of one of the parties, the *nature* of the transaction remains the same.

Jackson v.
Colegrave
(1694), Car-
thew, p. 388.

the latter part of the last century, were only discouraged by some trifling difficulties of pleading.¹

But the courts found that frivolous or indecent matters were brought before them for decision, and a rule came to be established that a wager was not enforceable if it could not be proved save by indecent evidence, or such as was calculated to injure or pain a third person; in some cases it was laid down as a rule of public policy that any wager which tempted a man to offend against the law was illegal.

Gilbert v.
Sykes (1812),
16 East, 150.

Strange, and even ludicrous results followed from these efforts of the courts to discourage the litigation of wagers. A bet upon the duration of the life of Napoleon was held to be unenforceable, as tending, on the one side, to weaken the patriotism of an Englishman, on the other, to encourage the idea of the assassination of a foreign ruler, and so to provoke retaliation upon the person of our own sovereign. But it is evident that the substantial motive which pressed upon the judges was 'the inconvenience of countenancing idle wagers in courts of justice,' the feeling 'that it would be a good rule to postpone the trial of every action upon idle wagers till the court had nothing else to attend to.'

Bayley, J.,
in *Gilbert v. Sykes*,
p. 162.

of statute
as to
wagers.

16 Car. II.

Meantime the legislature had begun to deal with such wagers. It was enacted by 16 Car. II. c. 7, that any sum exceeding £100 lost in playing at games or pastimes, or in betting on the players, should be irrecoverable, and that all forms of security

¹ In the United States some courts have followed the English law in holding wagers legal unless prohibited by statute, or, for special reasons, promotive of improper results. *Campbell v. Richardson*, 10 Johns. (N. Y.) 406; *Trenton &c. Ins. Co. v. Johnson*, 24 N. J. L. 576. But the strong tendency is to declare all wagers (save those for commercial objects) contrary to public policy and void. *Love v. Harvey*, 114 Mass. 80, II. & W. 324; *Bernard v. Taylor*, 23 Ore. 416, H. & W. 407; *Eldred v. Malloy*, 2 Colo. 320; *Wilkinson v. Tousley*, 16 Minn. 299.

given for money so lost should be void. The law was carried a stage further by 9 Anne, c. 14, whereby securities of every kind, whether given for money lost in playing at games, or betting on the players, or knowingly advanced for such purposes, were rendered void; and the loser of £10 or more was enabled to recover back money so lost and paid, by action of debt brought within three months of payment.

9 Anne, c.
14.

Cases of hardship resulted from the working of this act. Such securities might be purchased from the holders of them by persons ignorant of their illegal origin. These persons, when they sought to enforce them against the giver of the security, discovered, too late, that they had paid value for an instrument which was void as against the party losing at play. The Act 5 & 6 Will. IV. c. 41 therefore repealed the Act of Anne so far as regarded the avoidance of securities therein specified, and provided that they should henceforth be taken to have been originally given upon an illegal consideration. The holder of such an instrument may enforce it, if after proof of its illegal inception, he is able to show that he gave value for it and was ignorant of its origin: in other words — that he was a *bonâ fide holder for value*.

5 & 6
Will. IV.
c. 41.

See Part III.
ch. ii.

The next step was to make all wagers void: this was done by 8 & 9 Vict. c. 109, s. 18, which enacts:—

‘That all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. Provided always that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise.’¹

8 & 9 Vict.
c. 109. § 18.

¹ Gaming contracts are void by the statutes of most States. Stimson, Am. St. Law, § 4132. Most States have constitutional prohibi-

*It remained to deal with agreements arising out of wagers or made in contemplation of them. Wa- [*191] gers were only *void*, so that no taint of illegality attached to transactions collateral to wagers, except in the case of securities given for payment of money due in respect of such as fell under the Acts of Charles II. and Anne. Money lent to make or to pay bets could be recovered, and if one man employed another to make bets for him the ordinary rules prevailed which govern the relation of employer and employed.

The Gaming Act of 1892 alters the law in this respect.

55 Vict. c. 9. 'Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto, or in connexion therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.'^a

This act makes it impossible for a man to recover any commission or reward promised to him for making or paying bets. It also prohibits the recovery of money paid in discharge of the bets of another, whether this is done in virtue of a casual request, or in pursuance of the contract of employment existing between a betting commissioner and the man on whose behalf he makes bets.¹

But a man may still recover money received on his

^a The act is not retrospective: *Knight v. Lee*, [1893] 1 Q. B. 41.

tions against legalizing lotteries. *Ibid.*, § 426. In New York the legislature is forbidden to legalize any kind of gambling. Const. Art. I. § 9 (1895).

¹ In the United States if money is lent with the intention of enabling the borrower to make a wager it cannot be recovered, since wagers are illegal and not merely void; but mere knowledge or belief that the money is to be used for an illegal purpose will not prevent a recovery. *Tyler v. Carlisle*, 79 Me. 210, H. & W. 390; *White v. Buss*, 3 Cush. (Mass.) 448.

behalf by another on account of bets made and won; and if he has deposited money with a stakeholder to abide the event of a wager he may change his mind and recover it back at any time before the money is paid, because the words of the act '*promise . . . to pay any person any sum of money paid by him,*' which might be supposed to apply to the liability of the stakeholder, have been held to relate only to money paid out and out, and not to a deposit of money to await the result of an event.¹

De Mattos
v. Benjamin,
x T. L. R.
221, 63 L. J.
(Q. B.) 248.

O'Sullivan
v. Thomas,
[1895]
1 Q. B. 698.

The
Gaming
Acts.

The Act of 1845 repealed the Acts of Charles II. and Anne, *so that, apart from acts forbidding lotteries [*192] and certain games, and acts regulating insurance, we now have three statutes relating to wagers—5 & 6 Will. IV. c. 41, s. 1, as to securities given for money lost on certain kinds of wager; 8 & 9 Vict. c. 109, s. 18, as to wagers in general; 55 Vict. c. 9, as to collateral transactions, other than securities, arising out of wagers.

Securities given for money lost on wagers still fall into two classes, because 5 & 6 Will. IV. c. 41, s. 1, retains the distinction between wagers which fell under the Acts of Charles and Anne and those which do not.

Securities.

A promissory note given in payment of a bet made upon a cricket match is given for an illegal consideration; not only is it void as between the original parties to it, but every subsequent purchaser may be called on to show that he gave value for the note; and if he can be proved to have known of the illegal consideration for which it was first given, he may still be disentitled to recover upon it.

Considera-
tion
illegal.

A promissory note given in payment of a wager upon the result of a contested election would, as between the parties to it, be given on no consideration at all, inasmuch as it is given in discharge of an obligation which does not exist. But the wager is not illegal, it is simply void;

Promise
void.

¹ See *Bernard v. Taylor*, 23 Ore. 416, H. & W. 407; *Tyler v. Carlisle*, *supra*.

and if the note be endorsed over to a third party, it matters nothing that he was aware of the circumstances under which the note was originally given; nor does it lie upon him to show that he gave value for the note.¹

Fitch v.
Jones, 5 E.
& B. 245.

Commer-
cial
wagers.

As regards wagering contracts entered into for commercial purposes, there are three important subjects with which the legislature has dealt. These are stock exchange transactions, marine insurance, and insurance upon lives or other events.

7 Geo. II.c.8.

Stock ex-
change
transac-
tions.

Sir John Barnard's Act (1734) dealt with 'the infamous practice of stockjobbing,' and was more particularly directed to wagers on the price of stock, or, as they are sometimes called, 'agreements to pay differences.' These originate in some such transaction as this: *A* contracts with *X* for the *purchase of fifty Russian bonds at £78 for every £100 bond. The contract is to be exe-^[*193]cuted on the next settling day. If by that date the bonds have risen in price, say to £80, *X*, unless he has the bonds on hand, must buy at £80 to sell at £78; and if he has them on hand, he is obliged to part with them below their market value. If, on the other hand, the bonds have gone down in the market, *A* will be obliged to pay the contract price which is in excess of the market value.

It is easy to see that such a transaction may be a wager and nothing more, a bet on the price of stock at a future day. *A* may never intend to buy nor *X* to sell the bonds in question; they may intend no more than that the winner should receive from the loser the difference between the contract price and the market value on the settling day. And yet such a payment of differences may

¹ Negotiable instruments given in payment of wagers may be declared void by statute. Stimson, Am. St. Law, § 4132. If not so declared by statute, they follow the general rule as to illegal consideration and are valid in the hands of *bonâ fide* holders for value; but the holder has the burden of showing that he took without notice and for a valuable consideration. *Vosburgh v. Diefendorf*, 119 N. Y. 357.

be perfectly *bonâ fide*; A may have found so much better an investment for his money between the date of the contract and the settling day that it is well worth his while to pay a difference in X's favour to be excused performance of the contract.

Sir John Barnard's Act has been repealed; contracts of this nature, if proved to be simple wagers, fall under the 8 & 9 Vict. c. 109, § 18.^a But it is hard to prove that they are so. Shares may be bought on the terms that no shares are to change hands; then the transaction is a wager on their price at a future day. But if the purchase is the result of one agreement and the payment of the difference is the result of another, it is impossible to say that either is a wager, and not easy to construct a wager by combining the two transactions.¹

23 & 24 Vict.
c. 28.

Grizewood
v. Blane,
11 C. B. 533.

Thacker v.
Hardy,
4 Q. B. D.
685.

Marine insurance is dealt with by 19 Geo. II. c. 37, the effect of which is to avoid all insurances on British ships or merchandise laden on board such ships unless the person effecting the insurance is *interested* in the thing insured. What is an insurable interest, that [*194] is to say such an interest *as entitles a man to effect

Marine
insurance.

^a The effect of 8 & 9 Vict. c. 109. § 18 upon stock exchange transactions is well summarized in the Appendix to the Report of the Stock Exchange Commission, 1878 [2157], p. 356.

¹ Wagers on the rise and fall of prices, or dealings in 'futures,' are illegal. *Mohr v. Miesen*, 47 Minn. 228, H. & W. 325; *Harvey v. Merrill*, 150 Mass. 1, H. & W. 383. These and other cases support the following conclusions: (1) Contracts for future delivery are valid, whether the seller has the goods or not; (2) option contracts, whether 'puts,' 'calls,' or 'straddles,' are not *per se* gambling contracts; (3) where there is nothing on the face of the contract to show that it is a wagering contract, it will be presumed to be valid and the burden of proving its illegality is upon him who alleges it; (4) its illegality is shown by satisfactory proof that neither party intended an actual sale followed by delivery, but intended a settlement of the difference between the contract price and the future market price in money. *Bigelow v. Benedict*, 70 N. Y. 202; *Story v. Salomon*, 71 N. Y. 420; *Irwin v. Williar*, 110 U. S. 499.

an insurance, is a question of mercantile law with which we are not here concerned.¹

Insurance
generally.

The Act 14 Geo. III. c. 48 deals with insurance generally (marine insurance excepted), and forbids insurances on the lives of any persons, or on any events whatsoever in which the person effecting the insurance has no interest. It further requires that the names of the persons interested should be inserted in the policy, and provides that no sum greater than the interest of the insured at the time of insurance should be recovered by him. A creditor may thus insure the life of his debtor, and a lessee for lives may insure the lives upon which the continuance of his lease depends.

Darrell v.
Tibbitts,
5 Q. B. D.
560.

But life insurance differs in an important respect from marine or fire insurance. The latter contemplate a specified loss, they are essentially contracts of indemnity,^a and if the insured recovers the amount of his loss from any other source the insurer may recover from him *pro tanto*.^b

Life insurance
differs
from other
contracts
of insurance.

‘Policies of insurance against fire or marine risk are contracts to recoup the loss which parties may sustain from particular causes. When such loss is made good *aliunde*, the companies are not liable for a loss which has not occurred; but in a life policy there is no such provision. *The policy never refers to the reason for effecting it.*

^a The fact that the amount recoverable by the insured is thus limited by the amount of his loss does not alter the character of insurance as a wager. For a wager is not necessarily a gambling transaction; it is only a certain form of contract.

^b This right is called the ‘*subrogation*’ of the insurer into the rights of the insured. Its nature is most clearly set forth in *Castellain v. Preston*, 11 Q. B. D. (C. A.) 380.

¹ A few of the American States held marine insurance policies valid though the insured had no insurable interest. *Buchanan v. Ins. Co.*, 6 Cow. (N. Y.) 318, and see *Trenton &c. Ins. Co. v. Johnson*, 24 N. J. L. 576. But the strong tendency has been to hold illegal all wagering contracts upon matters in which the parties have no interest. *Ante*, p. 232, note 1. Such contracts are now generally forbidden by statute. For a discussion of the meaning of the term ‘insurable interest,’ see Greenhood, Public Policy, pp. 238–91.

It is simply a contract that in consideration of a certain annual payment, the company will pay at a future time a fixed sum, calculated by them with reference to the value of the premiums which are to be paid, in order to purchase the postponed payment.'

Law v.
London
Indisputable
Life Policy
Co.,
1 K. & J. 228.

Thus, though in a life policy the insured is required to have an interest at starting, that interest is nothing as between him and the company who are the insurers. 'The policy never refers to the reason for effecting it.' The insurer promises to pay a large sum on the happening of a *given event, in consideration of the insured [*195] paying lesser sums at stated intervals until the happening of the event. Each takes his risk of ultimate loss, and the statutory requirement of interest in the insured is no part of the contract. And so if a creditor effects an insurance on his debtor's life, and afterwards gets his debts paid, yet still continues to pay the insurance premiums, the fact that the debt has been paid is no answer to the claim which he may have against the company. This rule was established, after some conflict of judicial opinion,^a in *Dalby v. The India and London Life Assurance Company*.¹

14 Geo. III.
c. 48. § 2.

15 C. B. 365.

(ii) *Contracts illegal at common law.*

(ii) Com-
mon law
illegality.

(a) *Agreements to commit an indictable offence or civil wrong.*

It is plain that the courts would not enforce an agreement to commit a crime or an indictable offence; but the

(a) Indict-
able
offence,

^a See *Godsall v. Boldero*, 9 East, 72, where Lord Ellenborough treated life insurance as a contract of indemnity.

¹ *Accord: Corson's Appeal*, 113 Pa. St. 438; *Rittler v. Smith*, 70 Md. 261. So, also, if one having an insurable interest take out a policy in good faith and assign it to one not having an insurable interest, the latter may recover the full amount of the policy. *Clark v. Allen*, 11 R. I. 439. *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24; *Martin v. Stubbings*, 126 Ill. 387. *Contra: Warnock v. Davis*, 104 U. S. 775, H. & W. 333; *Basye v. Adams*, 81 Ky. 368.

ground here is almost entirely covered by statutes in which the criminal law has been embodied.

or civil
wrong.

Nor again will the courts enforce an agreement to commit a civil wrong.¹

2 Lev. 174.

Clay v.
Yates,
1 H. & N. 73.
Mallalieu v.
Hodgson,
16 Q. B. 689.

An agreement to commit an assault has been held to be void, as in *Allen v. Rescous*, where one of the parties undertook to beat a man. So too has an agreement involving the publication of a libel. Frauds upon creditors in view of bankruptcy afford a common illustration of this sort of illegality.

A debtor making a composition with his creditors of 6s. 8d. in the pound, entered into a separate contract with the plaintiff to pay him a part of his debt in full. This was held to be a fraud on the other creditors, each of whom had promised to forego a portion of his debt in consideration that the others would forego theirs in a like proportion. 'Where a creditor in fraud of the agreement to accept the composition stipulates for a preference to himself, his stipulation is altogether void.'² On the same ground the courts will not support a condition *in a contract that in the event of a man's becoming bankrupt certain articles of his property should [*196] be taken from his creditors and go to the promisee.

Ex parte
Barter, 26
Ch. D. 510.

Thus too where the plaintiff purchased from the defendants an exclusive right to use a particular scientific process, and it turned out that they had no such exclusive right as they professed to sell, it was held that the plaintiff could not recover because, to the knowledge of both parties, the purchase was made in order to start a company out of which the plaintiff expected to make a profit by defrauding the shareholders.

Begbie v.
Phosphate
Sewage Co.,
L.R. 10 Q. B.
at p. 499.

¹ *Materne v. Horwitz*, 101 N. Y. 469, H. & W. 338; *Merrill v. Packer*, 80 Iowa, 542, H. & W. 339 n.

² *White v. Kuntz*, 107 N. Y. 518; *Kullman v. Greenebaum*, 92 Cal. 403; *Cheveront v. Textor*, 53 Md. 295.

Fraud is a civil wrong, and an agreement to commit a fraud is an agreement to do an illegal act. But fraud as a civil wrong must be kept apart from fraud as a vitiating element in contract.

Fraud and
illegality.

If *A* is induced to enter into a contract with *X* by the fraud of *X* the contract is *voidable* because *A*'s consent is not genuine; and if *A* does not discover the fraud in time to avoid the contract he may sue in *tort* for such damage as he has sustained. If *A* and *X* make a contract the object of which is to defraud *M* the contract is *void*, because *A* and *X* have agreed to do what is illegal. We must not confuse *reality of consent* with *legality of object*.

As in *Smith*
on *Con-*
tracts, Lect.
vi.

(b) *Agreements to do that which it is the policy of the law to prevent.*

The policy of the law, or public policy, is a phrase of common use in estimating the validity of contracts. Its history is obscure; most likely agreements which tended to restrain trade or to promote litigation were the first to elicit the principle that the courts would look to the interests of the public in giving efficacy to contracts. Wagers, while they continued to be legal, were a frequent provocative of judicial ingenuity on this point, as is sufficiently shown by the case of *Gilbert v. Sykes* quoted above: but it does not seem probable that the doctrine of [*197] public policy began in the *endeavour to elude their binding force." Whatever may have been its origin, it was applied very frequently, and not always with the happiest results, during the latter part of the last and the commencement of the present century. Modern decisions, however, while maintaining the duty of the courts to consider the public advantage, have

(b) Public
policy.

General
applica-
tion.

16 East, 150.

Egerton v.
Earl Brown-
low,
4 H. L. C. 1.

* Sir Frederick Pollock holds that the discouragement of wagers was the foundation of the doctrine of 'public policy,' but restraint of trade has a prior claim: see Year Book, 2 Hen. V. pl. 26, and the comment of Lord St. Leonards in *Egerton v. Earl Brownlow*.

Contract,
ed. 6, p. 298.

4 H. L. C.
p. 237.

Printing Co.
v. Sampson,
19 Eq. 465.

tended to limit the sphere within which this duty has been exercised, and the modern view of the subject is perhaps best expressed by Jessel, M.R.: 'You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract.'

Maxim-Nordenfelt Co.
v. Nordenfelt, [1893]
1 Ch. (C. A.)
at p. 665.

The policy of the law has then, on certain subjects, been worked into a set of tolerably definite rules, differing from the rules of common law only in the greater ease with which they can be moulded to meet changed conditions of society or to admit of exceptions required by public convenience. Contracts which are void as contrary to public policy differ from those with which I have just dealt in this way, that the objects aimed at in the latter would, if carried out, constitute an actionable wrong or an indictable offence, whereas that which is against public policy is for the most part not illegal but void, or illegal in the sense that it is contrary to public morals. We may arrange such contracts under certain heads.

Agreements which injure the state in its relations with other states.

(α) International relations.

These fall under two heads, friendly dealings with a hostile state, and hostile dealings towards a friendly state.

Contract with alien enemy,

7 E. & B.
763.

Not only is it unlawful to enter into contracts with an alien enemy, but it is unlawful to purchase goods in an enemy's country without license from the crown. Thus in the case of *Esposito v. Bowden* a contract of charter-party, in which an English subject chartered a neutral ship to bring a cargo of corn from Odessa, was avoided by the outbreak of hostilities between England and Russia.

7 E. & B.
p. 798.

* For a British subject (not domiciled in a neutral country) to ship a cargo from an enemy's port, even in a neutral vessel, [*198] without license from the crown, is an act *primâ facie* and under all circumstances a dealing and trading with the enemy, and therefore forbidden by law.'

But the sovereign who has the right to proclaim war

may, by order in council, suspend the effect of such proclamation for a time so as to allow the performance of subsisting contracts within that time.¹

An agreement which contemplates action hostile to a friendly state is unlawful and cannot be enforced. So the courts will afford no assistance to persons who 'set about to raise loans for subjects of a friendly state to enable them to prosecute a war against their sovereign.'²

or hostile to friendly state.

De Wutz v. Hendricks, 2 Bing. 316.

There seems no authority as to the lawfulness of a contract to break the law of a foreign country but the opinion of writers on the subject that such a contract could not be enforced. Nor does there seem to be authority for a *dictum* of Lord Mansfield that 'no country ever takes notice of the revenue laws of another.' It must be considered very doubtful whether an agreement to break the revenue laws of a friendly state would now furnish a cause of action.³

Holman v. Johnson, Cowp. 343.

Agreements tending to injure the public service.

(B) Public service.

The public has an interest in the proper performance of their duty by public servants, and is entitled to be served by the fittest persons procurable. Courts of law hold contracts to be illegal which have for their object the sale of public offices or the assignment of the salaries of such offices.⁴

Sale of offices.

¹ Contracts with alien enemies which involve any communication across the lines of hostilities are illegal. *United States v. Grossmayer*, 9 Wall. (U. S.) 72, H. & W. 215; *Kershaw v. Kelsey*, 100 Mass. 561; *Woods v. Wilder*, 43 N. Y. 164.

² *Pond v. Smith*, 4 Conn. 297; *Kennett v. Chambers*, 14 How. (U. S.) 38.

³ Contracts looking to the breach of the laws of a sister State of the Union are illegal. *Graves v. Johnson*, 156 Mass. 211, H. & W. 391.

⁴ The following contracts are illegal: agreements to appoint to public office, *Robertson v. Robinson*, 65 Ala. 610; to sell, procure, or exchange a public office, *Martin v. Royster*, 8 Ark. 74; *Meguire v. Corwine*, 101 U. S. 108; *Stroud v. Smith*, 4 Houst. (Del.) 448; or any

2 B. & C. 661. In *Card v. Hope*, which is perhaps an extreme case, a deed was held to be void by which the owners of the majority of shares in a ship sold a portion of them, the purchaser acquiring the command of the ship for himself and the nomination to the command for his executors.

Blachford v. Preston,
8 T. R. 89. The ship was in the service of the East India Company, and this had been held equivalent to being in the public service, but the judgment proceeded on the ground that the public had a right to the exercise by the *owners of *any* ship of their best judgment in selecting officers [*199]

5 & 6 Ed. VI. c. 16. law deal with this subject is that the public has a right to
49 Geo. III. c. 126. some better test of the capacity of its servants than the fact that they possess the means of purchasing their offices.

31 Eliz. c. 6. Statute forbids contracts for valuable consideration to
13 Anne, c. 6. present to a vacant benefice or the purchase by a person in orders of a next presentation to a benefice which is not vacant. Thus too 'the policy of the law' will not uphold a disposition of property which was made conditional on the holder procuring a title of honour.

Egerton v. Brownlow,
4 H. L. C. 1. On a somewhat different principle the same rule applies to the assignment of salaries or pensions. 'It is fit,' said Lord Abinger in *Wells v. Foster*, 'that the public servants should retain the means of a decent subsistence without being exposed to the temptations of poverty.' And in the same case, Parke, B., lays down the limits within which a pension is assignable. 'Where a pension is

Assign-
ment of
salaries,
8 M. & W.
151

or pen-
sions.

position of trust and confidence, *Forbes v. McDonald*, 54 Cal. 98; to influence legislative action by 'lobbying,' *Trist v. Child*, 21 Wall. (U. S.) 441, H. & W. 340; to influence executive action improperly, *Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Oscanyan v. Arms Co.*, 103 U. S. 261; (but see *Lyon v. Mitchell*, 36 N. Y. 235; *Southard v. Boyd*, 51 N. Y. 177, H. & W. 347); to influence corporate or other fiduciary action, *Woodstock Iron Co. v. Richmond &c. Co.*, 129 U. S. 643; to quiet competition for public contracts, *Brooks v. Cooper*, 50 N. J. Eq. 761; *Boyle v. Adams*, 50 Minn. 255; to aid the election of a candidate contrary to the convictions of the one so aiding, *Nichols v. Mudgett*, 32 Vt. 546.

granted, not exclusively for past services, but as a consideration for some continuing duty or service, then, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable.' ¹

Agreements which tend to pervert the course of justice.

(v) Justice.

These most commonly appear in the form of agreements to stifle prosecutions, as to which Lord Westbury said, 'You shall not make a trade of a felony. If you are aware that a crime has been committed you shall not convert that crime into a source of profit or benefit to yourself.'²

Stifling criminal proceedings,

Williams v. Bayley,
L. R. 1 H. L. 220.

An exception to this rule is found in cases where civil and criminal remedies co-exist: a compromise of a prosecution is then permissible. The exception and its limits are thus stated:—

except where civil and criminal remedies co-exist.

'We shall probably be safe in laying it down that the law will permit a compromise of all offences though made the subject of ^[*200] a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.'

Keir v. Leeman,
6 Q. B. 821,
and see
9 Q. B. 395.

In a recent case the Court of Appeal has accepted this statement of the law as authoritative.³

Windhill Local Board v. Vint,
45 Ch. D. (C. A.) 351.

Agreements to refer matters in dispute to arbitration have been regarded as attempts to 'oust the jurisdiction of the courts,' and are not necessarily enforced. The Common Law Procedure Act, 1854, gave the courts a

Civil proceedings. Reference to arbitration.

17 & 18 Vict. c. 125. § 11.

¹ Unearned salaries cannot be assigned; *Bowery Nat. Bk. v. Wilson*, 122 N. Y. 478; nor the unearned fees of an executor, *Matter of Worthington*, 141 N. Y. 9. Pensions granted by the United States to soldiers and sailors are by statute unassignable. L. of U. S. 1883, c. 58; 22 St. at L. 431.

² *Partridge v. Hood*, 120 Mass. 403, H. & W. 348.

³ See *Nickelson v. Wilson*, 60 N. Y. 362; *Taylor v. Cottrell*, 16 Ill. 93. The matter is often regulated by statute.

discretionary power to stay proceedings pending an arbitration, where there was an agreement to refer an existing dispute, and the rules on the subject are now consolidated in the Arbitration Act, 1889. But when a contract contains a term providing that disputes arising out of it shall be referred to arbitration, the validity of such a condition depends upon the mode in which it is expressed. Where the fact of breach or the amount of damage is to be ascertained by arbitration before a right of action arises, the condition is good: where all matters in dispute, of whatever sort, are to be referred to arbitrators and to them alone, such a condition is no answer to an action on the contract. The one imposes a condition precedent to a right of action accruing, the other endeavours to prevent any right of action accruing at all.¹

52 & 53 Vict.
c. 49.

Scott v. Avery,
5 H. L. C.
811.

Edwards v. Aberayron Insurance Society,
1 Q. B. D.
596.

(δ) Abuse
of legal
process:
champerty
and main-
tenance.

Agreements which tend to abuse of legal process.

Under the old names of maintenance and champerty two objects of agreement are described which the law regards as unlawful. They tend to encourage litigation which is not *bonâ fide* but speculative. It is not thought well that one should buy an interest in another's quarrel, or should incite to litigation by offers of assistance for which he expects to be paid.

Maintenance has been defined to be 'when a man maintains a suit or quarrel to the disturbance or hindrance of right.'

Champerty is where 'he who maintains another is to have by agreement part of the land, or debt, in suit.'

*Maintenance is a civil wrong which does not [*201]

Com. Dig.
vol. v. p. 22.

¹ Condition precedent to right of action: *Hamilton v. Liverpool Ins. Co.*, 136 U. S. 242, H. & W. 351; but the agreement to arbitrate may be an independent promise. *Hamilton v. Home Ins. Co.*, 137 U. S. 370, H. & W. 353 n. Attempt to prevent right of action accruing: *Bauer v. Samson Lodge*, 102 Ind. 262.

often figure in the law of contract. It is thus defined by Lord Abinger:—

‘The law of maintenance, as I understand it upon modern constructions, is confined to cases where a man improperly and for the purpose of stirring up litigation and strife encourages others to bring “actions or to make defences which they have no right to make.”

Findon v.
Parker, 11.
M. & W. 632.

Lord Coleridge held that this definition was applicable to the giving of an indemnity to an informer against costs incurred in endeavouring to enforce a statutory penalty.

Bradlaugh
v. Newde-
gate,
11 Q. B. D. 5.

But it is not wrongful to provide the means by which a poor man may maintain a suit, even though the charity may be misguided and the action groundless, and the same principle applies with greater force to the case of a kinsman or servant.¹

Harris v.
Brisco, 17
Q. B. D. 504.

Champerty, or the maintenance of a quarrel for a share of the proceeds, has been repeatedly declared to avoid an agreement made in contemplation of it. Its most obvious form, a promise to supply evidence or the costs of a suit in consideration of receiving a portion of the money or property to be recovered, has been held illegal. Its less obvious form, a purchase out and out, of a right to sue has been regarded as an assignment of a *chose in action*,^b a matter with which we shall presently come to deal. Such an agreement is binding if the purchase includes any substantial interest beyond a mere right to litigate. If property is bought to which a right to sue attaches, that fact will not avoid the contract, but an agreement to purchase a bare right of action would not be sustained.²

Cham-
perty.

Stanley v.
Jones,
7 Bing. 869.
James v.
Kerr, 40
Ch. D. 458.

Prosser v.
Edmonds,
1 Y. & C. 499.

‘The old books suggest that it is not maintenance to start an action. ‘A maintenance cannot be, unless he has some plea pending at the time.’ So unreasonable a distinction appears to have been dropped in modern decisions.

Viner,
Abridg.,
Tit.

^b I have dealt on a later page with the meaning of this term so far as it concerns the law of contract.

Mai-
ntenance.

¹ *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623.

² There is disagreement in the American courts as to what constitutes champerty. (1) Some courts hold that an agreement to look to the proceeds of the suit for compensation is champerty. *Ackert v.*

(2) Good
morals
generally.

Agreements which are contrary to good morals.

The only aspect of immorality with which courts of law have dealt is sexual immorality; and the law upon this point may be shortly stated.

*A promise made in consideration of future illicit cohabitation is given upon an immoral con- [*202] sideration, and is unlawful whether made by parol or under seal.¹

Ayerst v.
Jenkins,
16 Eq. 275.

A promise made in consideration of past illicit cohabitation is not taken to be made on an illegal consideration, but is a mere gratuitous promise, binding if made under seal, void if made by parol.²

Gray v.
Mathias,
5 Ves. 285, a.
Beaumont
v. Reeve,
8 Q. B. 488.

And an agreement innocent in itself will be vitiated if intended to further an immoral purpose and known by both parties to be so intended.³

Pearce v.
Brooks,
L. R.
1 Exch. 218.

(5) Mar-
riage.

Agreements which affect the freedom or security of marriage.

Restraint
of mar-
riage,

Such agreements, in so far as they restrain the freedom of marriage, are discouraged on public grounds as injuri-

Barker, 131 Mass. 436, H. & W. 354. (2) Some courts hold that in addition the attorney must prosecute the suit at his own cost and expense to constitute champerty. *Phillips v. South Park Com'rs*, 119 Ill. 626. (3) Some courts hold even in a case like (2) that there is no champerty. *Taylor v. Bemiss*, 110 U. S. 424. (4) Some courts declare that maintenance and champerty are unknown to the common law of such States. *Mathewson v. Fitch*, 22 Calif. 86. (5) Some States regulate the matter by statute. *Fowler v. Callan*, 102 N. Y. 395. (6) All authorities agree that a contract for a contingent fee is not champerty if it is not to be paid out of the proceeds of the suit. *Blaisdell v. Ahern*, 144 Mass. 393. (7) There is a marked tendency to narrow the doctrines of champerty or to evade them. *Reece v. Kyle*, 49 Oh. St. 475; *Dunne v. Herrick*, 37 Ill. App. 180; *Manning v. Sprague*, 148 Mass. 18; *Richardson v. Rowland*, 40 Conn. 571.

¹ *Boigneres v. Boulon*, 54 Calif. 146, H. & W. 357; *Brown v. Tuttle*, 80 Me. 162. Cf. *Kurtz v. Frank*, 76 Ind. 594, H. & W. 358.

² *Brown v. Kinsey*, 81 N. C. 245, H. & W. 395.

³ *Ernst v. Crosby*, 140 N. Y. 364; *Graves v. Johnson*, 156 Mass. 211, H. & W. 391.

ous to the moral welfare of the citizen. So a promise under seal to marry no one but the promisee on penalty of paying her £1000 was held void, as there was no promise of marriage on either side and the agreement was purely restrictive. So too a wager in which one man bet another that he would not marry within a certain time was held to be void, as giving to one of the parties a pecuniary interest in his celibacy.¹

Lowe v. Peers,
4 Burr. 222b

Hartley v. Rice,
10 East, 22.

What are called marriage brokerage contracts, or promises made upon consideration of the procuring or bringing about a marriage, are held illegal on various social grounds.²

or of freedom of choice.

Arundel v. Trevillian,
Rep. in Ch. 47.

Agreements for separation.

Agreements providing for separation of husband and wife are valid if made in prospect of an immediate separation. But if such agreements provide for a possible separation in the future they are illegal, whether made before or after marriage, because they give inducements to the parties not to perform 'duties in the fulfilment of which society has an interest.'³

Cartwright v. Cartwright,
8 D. M. & G. 989.

Agreements in restraint of trade.



The law concerning restraint of trade has changed from time to time with the changing conditions of trade, but with trifling exceptions these changes have been a continuous development of a general rule.

(7) Restraint of trade.

*The early cases show a disposition to avoid all [*203] contracts 'to prohibit or restrain any, to use a lawful trade at any time or at any place,' as being 'against

¹ *Sterling v. Sinnickson*, 2 Southard (5 N. J. L.), 756, H. & W. 359; *Chalfant v. Payton*, 91 Ind. 202.

² *Duval v. Wellman*, 124 N. Y. 156, H. & W. 402.

³ *Randall v. Randall*, 37 Mich. 563. Agreements for collusive divorce are illegal. *Cross v. Cross*, 58 N. H. 373, H. & W. 361. As to an agreement of a wife to return to her marital relations under circumstances where she is entitled to a divorce, see *Merrill v. Peaslee*, 146 Mass. 460.

Colegate v.
Bacheler,
Cro. Eliz.
572, 1596.

the benefit of the commonwealth.' But soon it became clear that the commonwealth would not suffer if a man who sold the goodwill of a business were able to bind himself not to enter into immediate competition with the buyer, and so it was laid down in *Rogers v. Parry* that 'a man cannot bind one that he shall not use his trade generally,' 'but for a time certain, and in a place certain, a man may be well bound and restrained from using of his trade.'

Bulstrode,
136, 1613.

Permis-
sible re-
strictions,

Thus we get an established rule, a contract in general restraint of trade is contrary to public policy, a contract in partial restraint will be upheld.

Henceforth, as trade expands and the dealings of an individual cease to be confined to the locality in which he lives, the construction of agreements in partial restraint of trade expand also.

1 H. & N.
139.
7 M. & G.
969.

A man may limit his freedom as regards the persons with whom he will trade, as in *Rannie v. Irvine*, or the mode in which he will trade, as in *Jones v. Lees*, but the most common form of restriction was restriction as to place. Hence the distinction between general and partial restraints became confused with a distinction between restraints unlimited as to place and restraints unlimited as to time, and it was laid down that a man might not contract himself out of the right to carry on a certain trade *anywhere*, for ten years, though he might contract himself out of the right *ever* to carry on a trade within ten miles of London.

extended
by public
policy.

The rule as thus expressed was inapplicable to the modern conditions of trade. In the sale of a goodwill or a trade secret the buyer might in old times have been sufficiently protected by limited restrictions as to the place or persons with whom the seller should henceforth deal. This is not so where an individual or a company supplies some article of commerce to the civilized world.

The old distinction between *general and partial
 [*204] restraints was more flexible, and its application is
 well illustrated by *The Maxim-Nordenfelt Gun Co. v. Nordenfelt*. [1898] 1 Ch.
 (C. A.) 680.

Nordenfelt was a maker and inventor of guns and ammunition: he sold his business to the company for £287,500, and agreed that for twenty-five years he would cease to carry on the manufacture of guns, gun-carriages, gunpowder, or ammunition, or any business liable to compete with such business as the company was carrying on for the time being. He retained the right to deal in explosives other than gunpowder, in torpedoes or submarine boats, and in metal castings or forgings.

After some years Nordenfelt entered into business with another company dealing with guns and ammunition; the plaintiffs sought an injunction to restrain him from so doing.

The Court of Appeal exhaustively reviewed the cases bearing on the subject, and held:—

(1) that the covenant not to compete with the company in any business which it might carry on was a general restraint of trade, that it was void, but that it was distinct and severable from the rest of the contract.

General
restraint
void.

(2) that the sale of a business accompanied by an agreement by the seller to retire from the business, is not a general restraint of trade, provided it is reasonable between the parties, and not injurious to the public.

Partial
restraint
good,

This restraint was reasonable between the parties, because Nordenfelt not only received a very large sum of money, but retained considerable scope for the exercise of his inventive and manufacturing skill, while the wide area over which the business extended necessitated a restraint coextensive with that area for the protection of the plaintiffs. Nor could the agreement be said to be injurious to the public interest since it transferred to an

if reasonable
between the
parties,

and not
injurious
to public.

English company the making of guns and ammunition for foreign lands.

But it should be observed that the very elaborate judgment of Bowen, L.J., seems to lay down a hard and fast rule that *agreements in restraint of trade are divisible into two classes—general, and partial or particular: that the former are necessarily void and do not even admit of discussion as to their reasonableness, while the latter may be sustained subject to the conditions of reasonableness and public interest above mentioned.

Is general
restraint
always
void?

The House of Lords when reviewing the judgment of the Court of Appeal held that, whether or no such a distinction had existed as a rule of common law, it was no longer tenable.

‘Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which I think was long recognized as established, or whether the rule itself is to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law.’¹

Nordenfelt
Maxim
Gun Co.,
[1894] A. C.
543.

But the reasonableness of the transaction is not the only matter into which the courts will inquire, though equity judges seem to have, not unnaturally, confined themselves

¹ “Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained.” Mr. Chief Justice Fuller in *Fowle v. Park*, 131 U. S. 88, 97. The general tendency of modern American decisions is to make the test whether the restraint is reasonably necessary for the protection of the covenantee. *Diamond Match Co. v. Roeber*, 106 N. Y. 473, H. & W. 362; *Herreshoff v. Boutineau*, 17 R. I. 3; *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272. But a few courts still apply the older English test as to space. *Gamewell Fire Alarm Tel. Co. v. Crane*, 160 Mass. 50.

in some cases ^a to the equities of the matter as between the parties. A covenant might be fair as between the parties and yet injurious to the public interest. In such a case it would be held void.¹ [1894] A. C. 549.

It remains to note that at one time it was thought that the courts would inquire into the *adequacy* of the consideration given for the promise not to trade. But this was disavowed by the Exchequer Chamber in *Hitchcock v. Coker*, and seems to resolve itself into the rule which requires the promisee to satisfy the court that the transaction is reasonable. 6 A. & E. 438.

[*206] *§ 2. EFFECT OF ILLEGALITY UPON CONTRACTS
IN WHICH IT EXISTS.

The effect of illegality upon the validity of contracts in which it exists, must needs vary according to circumstances. It may affect the whole or only a part of the contract, and the legal part may or may not be severable from the illegal. One of the parties may be ignorant of the illegal object which the contract is intended to serve, or both may be ignorant of any illegal intention. (2) What is the effect of illegality.

The contract may be discouraged in the sense that the law will not enforce it, or prohibited in such a way as to taint collateral contracts and securities given for money advanced to promote an illegal transaction or paid to satisfy a claim arising out of such a transaction.

^a Note the comments of Bowen, L.J., in the Nordenfelt case, upon the judgments in *Whittaker v. Howe*, and *Rousillon v. Rousillon*, and the rejoinder to these comments by Lord Macnaghten, [1894] A. C. p. 563 et sq. 3 Beav. 883, 14 Ch. D. 351.

¹ Such are cases where the covenantor is exercising a public franchise or engaged in a business 'impressed with a public trust.' *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 408-9. Agreements to combine for the purpose of lessening competition are illegal as opposed to the public welfare. *Oliver v. Gilmore*, 52 Fed. Rep. 562; *Santa Clara &c. Co. v. Hayes*, 76 Calif. 387, H. & W. 376; *Richardson v. Buhl*, 77 Mich. 632; *More v. Bennett*, 140 Ill. 69. Cf. *Central Shade Roller Co. v. Cushman*, 143 Mass. 353. See 26 U. S. St. at L. 209.

I will endeavour to state some rules which may enable the reader to work his way through a complex branch of the law.

(2) Divisible contract.

Legal parts of contract to be severed if possible from illegal.

Pigot's Case, Co. Rep. 11. 27 b.

(i) *When the contract is divisible.*

A contract may consist of several parts; it may be divisible into several promises based on several considerations, and then the illegality of one or more of these considerations will not avoid all the promises if those which were made upon legal considerations are severable from the others. This is an old rule and is set forth in Coke's Reports, 'That if some of the covenants of an indenture or of the conditions endorsed upon a bond are against law, and some good and lawful; that in this case the covenants or conditions which are against law are void *ab initio*, and the others stand good.'

Maleverer v. Redshaw, 1 Mod. 35.

The rule holds whether the illegality exist by statute or at common law, though at one time the judges thought differently, and fearing lest statutes might be eluded, laid it down that 'the statute is like a tyrant, where he comes he makes all void, but the common law is like a nursing father, makes only void that part where the fault is and preserves the rest.'

*The rule in its modern form may be thus stated:— [*207]

Per Willes, J., in *Pickering v. Iffra-combe Railway*, L. R. 3 C. P. 250.

'Where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them, whether the illegality be created by statute or common law, you may reject the bad part and retain the good.'

Illustrations of the rule are to be found in cases where a corporation has entered into a contract some parts of which are *ultra vires*, and so, in a sense, unlawful;^a or

L. R. 7 H. L. 658.

^a These cases may serve as an illustration of the proposition before us, but it must be borne in mind that Lord Cairns, in *The Ashbury Carriage Co. v. Riche*, has pointed out that contracts of this nature are invalidated not so much by the *illegality* of their object as by the *incapacity* of the corporation to bind itself by agreement for purposes beyond its statutory powers.

where it is possible to sever covenants in restraint of trade either as regards the distances within which the restraint applies, or the persons with whom the trade is to be carried on. Recent decisions furnish instances of covenants of this nature which are, and of covenants which are not severable.¹

Baines v. Geary, 85 Ch. D. 154.
Baker v. Hedgecock, 39 Ch. D. 520.
Maxim Gun Co. v. Nordenfelt, 62 L. J. Ch. 282.

(ii) *When the contract is indivisible.*

(ii) **Indivisible contract.**

Where there is one promise made upon several considerations, some of which are bad and some good, the promise is wholly void, for it is impossible to say whether the legal or illegal portion of the consideration most affected the mind of the promisor and induced his promise.² An old case which may be quoted in its entirety will illustrate this proposition:—

‘Whereas the plaintiff had taken the body of one H. in execution at the suit of J. S. by virtue of a warrant directed to him as special bailiff; the defendant in *consideration he would permit him to go at large*, and of two shillings to the defendant paid, promised to pay the plaintiff all the money in which H. was condemned. Upon *non assumpsit* it was found for the plaintiff. It was moved in arrest of judgment, that the consideration is not good, being contrary to the

Fetherston v. Hutchinson, Cro. Eliz. 199.

¹ If there are two promises, one legal and one illegal, resting upon one legal consideration, the promisee may waive the illegal promise and enforce the legal one. *Erie Railway Co. v. Union Loc. and Exp. Co.*, 35 N. J. L. 240, H. & W. 373; *United States v. Bradley*, 10 Pet. (U. S.) 343, 360–64; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 221; *Dean v. Emerson*, 102 Mass. 480; *Pelz v. Eichele*, 62 Mo. 171; *Smith's Appeal*, 113 Pa. St. 579. But not, it would seem, if the illegal act is highly immoral or highly detrimental to the public good. *Lindsay v. Smith*, 78 N. C. 328; *Santa Clara &c. Co. v. Hayes*, 76 Calif. 387, H. & W. 376.

² If there is one legal promise resting upon two considerations, one of which is legal and the other illegal, the promisee cannot enforce the promise, for he cannot (legally) perform the consideration. *Birby v. Moor*, 51 N. H. 402, H. & W. 378; *Bishop v. Palmer*, 146 Mass. 469, H. & W. 380; *Handy v. St. Paul Globe Co.*, 41 Minn. 188, H. & W. 318. It will be observed that an illegal contract might be enforced, so far as legal, by one party, but not by the other. *Bishop v. Palmer*, *supra*.

statute of 23 Hen. VI., and that a promise and obligation was all one. And though it be joined with another consideration of two shillings, yet being void and against the statute in part it is void in all.'

(iii) Avoidance and illegality distinguished. *(iii) *Comparative effects of avoidance and illegality.* [*208]

When there is no divisibility of promises or consideration, we have to consider first what was the attitude of the law towards the transaction contemplated, and next what was the mind of the parties towards the law.

The law may deal with a contract which it would discourage in one of three ways.

It may impose a penalty without avoiding the contract.

It may avoid the contract.

It may avoid, and penalise or prohibit.

In this last case we must take the word 'penalise' to mean not merely the imposition of a penalty, but the liability to damage for a wrong, or to punishment for a crime. A statutory penalty is merely a suggestion of prohibition. Whether it is prohibitory or not is, in every case, a question of construction.

A contract may be Thus we may suppose the state to say to the parties as regards these three kinds of transactions:—

penalised, (a) You may make the contract if you please, but you will have to pay for it.

avoided, (b) You may make the agreement if you please, but the courts will not enforce it.

forbidden. (c) You shall not make the agreement if the law can prevent you.

With the first case we are not concerned. There is a valid contract though it may be expensive to the parties.

As to the second and third, difficulties can only arise as regards collateral transactions, for in neither case can the contract be enforced. The intentions of the parties we will postpone for the present. They must be assumed to know the law.

It may be stated at once that there is a clear distinction between agreements which are *illegal* and agreements which are merely *void*: between agreements which the law will not aid, and agreements which the law desires to prohibit: and that this distinction comes out, not in the comparative validity *of the two, for both are [*209] void, but in the effect which their peculiar character imparts to collateral transactions.

Illegal
agree-
ments

No contract, however innocent in itself, is good, if designed to promote an illegal transaction, whether the illegality arises at common law, or by statute.

taint
collateral
trans-
actions.

In *Pearce v. Brooks* a coach-builder sued a prostitute for money due for the hire of a brougham, let out to her with a knowledge that it was to be used by her in the furtherance of her immoral trade. It was held that the coach-builder could not recover.¹

L. R. 1 Ex.
213.

In *McKinnell v. Robinson* the plaintiff lent money to the defendant to play at hazard, knowing that the money was to be so used. Hazard is forbidden,^a and the players rendered subject to a penalty by 12 Geo. II. c. 28. It was held that the lender could not recover.²

8 M. & W.
434.

Nor is a contract valid which is intended to carry into effect a prohibited transaction. Cannan was the assignee of a bankrupt, and sued Bryce to recover the value of goods given to him by the bankrupt in part satisfaction of a bond, which in its turn had been given to Bryce by

Cannan v.
Bryce, 3 B.
& Ald. 179.

^a Certain games with cards or dice are forbidden by 12 Geo. II. c. 28 and by 18 Geo. II. c. 34; these are, Ace of Hearts, Hazard, Pharaoh, Bassett, and Roulette, otherwise Roly Poly. These acts are prohibitory and penal: they do not merely make winnings at such games irrecoverable or invalidate securities given for money lost. They forbid the games and penalise the players.

¹ *Ernst v. Crosby*, 140 N. Y. 364. But mere knowledge is generally held insufficient; there must be an intent to aid in the accomplishment of the illegal purpose. *Tyler v. Carlisle*, 79 Me. 210, H. & W. 390. Cf. *Graves v. Johnson*, 156 Mass. 211, H. & W. 391. Unless the known object is of a heinous nature. *Hanauer v. Doane*, 12 Wall. (U. S.) 342.

² *Tyler v. Carlisle*, *supra*.

7 Geo. II.
c. 8. § 5.

the bankrupt to secure the payment of money lent by Bryce to meet losses which had been incurred by the stock-jobbing transactions of the bankrupt. The Act 7 Geo. II. c. 8 forbade not only wagers on the price of stock, but advances of money to meet losses on such transactions, and Bryce had lent money knowing that it was to meet such losses. Therefore his bond was void, and no property passed to him in the goods given in satisfaction of it, and Cannan was able to recover their value.

Void
agree-
ments.

The difference between the effect of illegality and of avoid-^{*}ance is clear when we look at transactions arising out of wagers before the passing of 55 Vict. [*210] c. 9.

Per Bowen,
L.J., 15
Q. B. D. 867.

‘The original contract of betting is not an illegal one, but only one which is void. If the person who has betted pays his bet, he does nothing wrong, he only waives a benefit which the statute has given to him, and confers a good title to the money on the person to whom he pays it. Therefore when the bet is paid the transaction is completed, and when it is paid to an agent it cannot be contended that it is not a good payment for his principal.’

And so it followed:—

Wettenhall
v. Wood,
1 Esp. 17.

(1) That money lent to make bets might probably have been recovered.

Pyke's case,
8 Ch. D. 756.

(2) That money lent to pay bets was recoverable.

Bridger v.
Savage, 15
Q. B. D. 868.

(3) That as between employer and betting commissioner the ordinary relations of employer and employed held good. The commissioner was bound to pay over money received on account of bets won by him on behalf of his principal. And the ordinary liability of an employer to indemnify the person whom he employs against loss or risk, which may accrue to him in the ordinary course of the employment, holds good, though the employment is to make void contracts.

Read v.
Anderson, 18
Q. B. D. 779.

Anderson employed Read to make bets for him, and after the bets had been made and lost, revoked the authority which he had given to Read to pay the bets.

Read was a turf-commissioner and a member of Tattersalls. If he had failed to pay the bets he would have been expelled from Tattersalls, and have lost his business as a turf-commissioner. He paid the bets and sued Anderson for their amount. The principle on which the Court of Appeal affirmed the liability of Anderson to repay Read, was that though Read could not have been compelled to pay the bets, yet the loss of character and business which he would have sustained if he had failed to pay, was a risk against which his employer was bound to indemnify him. It was a risk known to both parties and contemplated in the contract of employment.¹

Em-
ployer's
liability to
indemnify.

The Gaming Act, 1892, has destroyed the authority of
[*211] *these cases as regards their subject-matter, but
not as to the principle which they illustrate.

Seymour v. Bridge was decided on the same principle. 14 Q. B. D. 460.
An investor employed a broker to buy shares for him according to the rules of the stock exchange. The stock exchange enforces among its members, under pain of expulsion, agreements made in breach of Leeman's Act.^a 30 & 31 Vict. c. 29.
This act avoids contracts for the sale of bank shares without specifying their numbers, or the name of the registered proprietor.

Bridge knew of the custom, but endeavoured to repudiate the purchase on the ground that it was not made in accordance with the terms of the statute. The case was held to be governed by *Read v. Anderson*. The employer is bound to indemnify the employed against known risks of the employment. If the risks are not known to both parties, and might reasonably be unknown to the employer,

13 Q. B. D.
779.

^a In an earlier edition I stated erroneously that it was a misdemeanour on the part of the broker to make such contracts. It is a misdemeanour to insert false numbers or false names.

¹ In the United States, wagers are both illegal and void, and an agent cannot recover advances or commissions. *Harvey v. Merrill*, 150 Mass. 1, H. & W. 383.

Perry v.
Barnett, 15
Q. B. D. 398.
14 Q. B. D.
460.

he is not so bound. Thus where an investor did not know of the custom, he was held, under circumstances in other respects precisely similar to those of *Seymour v. Bridge*, not to be bound to pay for the shares.

(iv) *The intention of the parties.*

(iv) **Inten-
tion of par-
ties :**

as a rule
immaterial

Where the object of the contract is an unlawful act the contract is void, though the parties may not have known that their act was illegal or intended to break the law.

But if the contract admits of being performed, and is performed in a legal way, the intention of the parties may become important.

Waugh v.
Morris,
L. R. 8 Q. B.
202.

Morris chartered a ship belonging to Waugh to take a cargo of hay from Trouville to London. It was agreed that the hay should be unloaded alongside ship in the river, and landed at a wharf in Deptford Creek. Unknown to the parties an order in council had forbidden the landing of French hay. Morris, on hearing this, took the cargo from *alongside the ship without landing it, and exported it. The vessel was delayed beyond the lay-days, and Waugh sued for damages arising from the delay. Morris set up as a defence that the contract contemplated an illegal act, the landing of French hay contrary to the order in council. But the defence did not prevail.

Under 82 &
83 Vict. c.
70. § 78.
unless
contract
can be and
is legally
per-
formed.

‘Where a contract is to do a thing which cannot be performed without a violation of the law, it is void whether the parties knew the law or not. But we think that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and if this be so the knowledge of what the law is becomes of great importance.’¹

L. R. 8 Q. B.
10. 208.

Or where
illegal in-
tent is of
one only;

Again, the general rule needs modification where only one of the parties had the intention to break the law.

¹ *Favor v. Philbrick*, 7 N. H. 326.

Such a case could only arise where the contract was to do a thing innocent in itself, but designed to promote an illegal purpose. We may perhaps lay down with safety the following rules.

Where the innocent party knows nothing of the illegal object throughout the transaction, he is entitled to recover what may be due to him. If the plaintiff in *Pearce v. Brooks* had known nothing of the character of his customer, it cannot be supposed that he would have been unable to recover the hire of his brougham.¹

rights of
innocent
party
to sue,
L. R. 1 Ex.
213.

Where the innocent party becomes aware of the illegal purpose of the transaction before it is completed or while it is still executory he may avoid the contract.

to avoid.

Milbourn let a set of rooms to Cowan for certain days; then he discovered that Cowan proposed to use the rooms for the delivery of lectures which were unlawful because blasphemous within the meaning of 9 & 10 Will. III. c. 32; he refused, and was held entitled to refuse, to carry out the agreement.²

Cowan v.
Milbourn,
L. R. 2 Ex.
230.

If the innocent party to the contract discover the illegal purpose before it is carried into effect, it would seem that he could not recover on the contract if he allowed it to be performed, and that the defendant in *Cowan v. Milbourn* could not *have recovered the rent of his [*213] rooms, if, having let them in ignorance of the plaintiff's intentions, he allowed the tenancy to go on after he had learned the illegal purpose which his tenant contemplated.

How
affected
by knowl-
edge.

L. R. 2 Ex.
230.

¹ *Emery v. Kempton*, 2 Gray (Mass.), 257. The American student should remember that in the United States mere knowledge that an illegal act is contemplated is not generally enough; there must be an intent to participate in or further it. *Tyler v. Carlisle*, 79 Me. 210, H. & W. 390. Cf. *Graves v. Johnson*, 156 Mass. 211, H. & W. 391.

² Seemingly to the contrary is *O'Brien v. Brietenbach*, 1 Hilt. (N. Y. C. P.) 304.

(v) Effect
on secu-
rities.

(v) *Securities for money due on illegal transactions.*

The validity of bonds or negotiable instruments given to secure the payment of money due or about to become due upon an illegal or void transaction, does not depend entirely upon the distinction which I have drawn between transactions which are illegal and those which are void.¹

Where
transac-
tion is
past,

A security may be given in consideration of a transaction which is wholly past. Here comes in the elementary rule that gratuitous promises are not binding unless they are under seal. Applying this rule to bonds and negotiable instruments, we may say that a bond given in return for services rendered in a past transaction would be a valid promise, and that being wholly gratuitous, and founded on motive, a court of law would not inquire into the character of the motive.

Ayerst v.
Jenkins,
16 Eq. 275.

Thus a bond given in consideration of past illicit cohabitation is binding;² a negotiable instrument given on such consideration would, as between the immediate parties, be invalid, not on the ground that the consideration was immoral, but because there was no consideration at all.³

Beaumont
v. Reeve, 8
Q. B. 488.

where it
is future.

As regards transactions which are pending or contemplated, we are met by an anomalous distinction which divides securities for our present purpose into three groups.

(a) Secu-
rity under
seal,

(1) Let us deal first with securities under seal.

Fisher v.
Bridges,
8 E. & B.
642.

If given for money due in respect of a prohibited transaction they are void.

Fisher conveyed land to Bridges in order that it might be resold by lottery, a transaction forbidden under stringent penalties by 12 Geo. II. c. 28. After the land

¹ It is questionable whether any such distinction is taken in the American decisions.

² *Brown v. Kinsey*, 81 N. C. 245, H. & W. 395.

³ *Embrey v. Jemison*, 131 U. S. 336.

was conveyed, Bridges covenanted to pay a part of the purchase money by a fixed date, or failing this, by half yearly instalments. On this covenant an action was brought. The Exchequer *Chamber reversing the [*214] judgment of the Queen's Bench, held that the covenant could not be enforced. It was given to secure a payment which became due as the result of an illegal transaction, and the bond was tainted with the illegality of the purpose it was designed to effect.¹

transac-
tion pro-
hibited.

A transaction may be unlawful in the sense that it is avoided. In that case a security given in respect of it is on the same footing as a security given in respect of a transaction which is wholly past. It is valid if under seal; otherwise void as between the immediate parties.

Security
under seal,
transac-
tion void.

A corporation borrowed money on mortgage without first obtaining the leave of the Lords of the Treasury; this was declared to be 'unlawful' by the Municipal Corporations Act. But as they had received the money, and promised under seal to repay it, they were held bound by their promise.

5 & 6 Will.
IV. c. 76.

'Is there anything in the act which prohibits a corporation from entering into a covenant to pay its lawful debts? It is argued that § 94 renders this covenant void. But that section only says that it shall not be lawful to mortgage any lands of the corporation except with the approbation of the Lords of the Treasury, which was not obtained in this case; and although the mortgage may be invalid, that is no reason why the corporation should not be liable on their covenant to repay the mortgage money.'²

Payne v.
Mayor of
Brecon, 3
H. & N. 579.

(2) We now come to negotiable instruments.

In dealing with these we have to consider the effect of

(b) Secu-
rities not
under seal,

¹ *Griffiths v. Sears*, 112 Pa. St. 523.

² National banks are forbidden to loan money on real estate security. They may nevertheless enforce such securities against one who has had the benefit of the loan. This does not seem to proceed, however, upon the ground that the security is under seal, but upon the ground that the statute does not in terms make the transaction void. *National Bank v. Matthews*, 98 U. S. 621.

a flaw in their original making not only as between the immediate parties but as affecting subsequent holders of the instrument. And we may lay down the following rules:—

void as
between
immediate
parties.

Fitch v.
Jones,
5 E. & B.
245.

A negotiable instrument made and given as security for a void, or illegal transaction, is, as between the immediate parties, void. A promissory note was given in payment of a bet made on the amount of the hop duty in 1854. The bet was void by 8 & 9 Vict. c. 109, and the court was clear that as between the original or immediate parties the note was void also. There was no liability to pay the lost bet, and therefore no consideration for the note given to secure its *payment.¹ The position of the indorsee who brought the action shall be [*215] explained presently.

Right of
subse-
quent
holder.

Effect on
subse-
quent
holder.

If the instrument is made and given to secure payment of money due or about to become due upon an *illegal* transaction a subsequent holder loses the benefit of the rule, as to negotiable instruments, that consideration is presumed till the contrary is shown: he may be called upon to show that he gave consideration, and even then if it can be shown that he was aware of the illegality, he will be disentitled to recover.²

Flower v.
Sadler,
10 Q. B. D.
572.

If the instrument has an honest origin the maker or acceptor cannot set up, as a defence against a subsequent indorsee, that the indorsement was made for an illegal consideration, unless he can show that he is injuriously affected by the transaction between indorser and indorsee.

If the instrument is given to secure payment of money due or about to become due upon a *void* transaction, it is as between the immediate parties void, but a subsequent

¹ *Embrey v. Jemison*, 131 U. S. 336.

² *Vosburgh v. Diefendorf*, 119 N. Y. 357. There seems to be no distinction between void and illegal consideration, though there is between these and failure of consideration. *Little v. Mills*, 98 Mich. 423.

holder is not prejudiced by the fact that the original transaction was avoided by statute.¹

In *Fitch v. Jones*, above cited, the action was brought by the indorsee of a promissory note given in payment of a bet on the amount of the hop duty. The main question for the court was 'whether the plaintiff was bound on proof of the origin of the note to show that he had given consideration for the note, or whether it was for the defendant to show that he had given none.'

'I am of opinion,' said Lord Campbell, 'that the note did not take its inception in illegality within the meaning of the rule. The note was given to secure payment of a wagering contract, which, even before stat. 8 & 9 Vict. c. 109, the law would not enforce: ^a but it was not illegal: there is no penalty attached to such a wager; it is not in violation of any statute, nor of the common law, but it is simply void, so that the consideration was not an illegal consideration, but equivalent in law to no consideration at all.'

[*216] *(3) It remains to note the effect upon certain transactions of 5 & 6 Will. IV. c. 41. This act deals with securities given for money or valuables lost at any game or in bets on the sides or players in any game, or for money lent either to make or to pay such bets. The Act of Anne had made such securities wholly void, and this was hard on such persons as bought them at their ostensible value in ignorance of their origin. The Act of Will. IV.^b enacts that such securities should be deemed to

⁹ Anne, c. 14.

^a It had been held in a previous case, *Atherfold v. Beard*, that a wager on the amount of hop duty was against public policy because the evidence at the trial would expose to the world the state of the public revenue.

2 T. R. 610.

^b By § 2 of this act the maker of such a security, if he is compelled to pay its value to a subsequent *bonâ fide* purchaser, may recover the amount from the person to whom it was originally given.

¹ A *bonâ fide* holder for value may enforce a negotiable instrument given upon an illegal or void consideration, unless the statute declares that such instrument shall be void. *New v. Walker*, 108 Ind. 365, H. & W. 399; *Cranson v. Goss*, 107 Mass. 439; *Traders' Bank v. Alsop*, 64 Iowa, 97; *Glenn v. Farmers' Bank*, 70 N. C. 191. But he must show that he is a *bonâ fide* holder for value. *Vosburgh v. Diefendorf*, *supra*.

Read v.
Anderson,
13 Q. B. D.
(C. A.) 779.

have been made on an illegal consideration. This places wagers on games in a peculiar position. A wager is not in itself unlawful, it is only void: but securities given for money due on wagers of a certain sort are in a worse position than the wagers. The consideration for them is illegal: thus they are not merely void as between the original parties; the taint of illegality affects a subsequent holder, who although the original transaction was only void, must show that he gave consideration for the security, and may yet be disentitled to recover, if it is proved that he knew of its origin.¹

(vi) Relief
from ille-
gal con-
tracts.

(vi) *Can a man be relieved from a contract which he knew to be unlawful?*

Illegality
known at
the time,
no ground
for avoid-
ance,

It remains to consider whether a party to an illegal contract can under any circumstances make it a cause of action. The rule is clear that a party to such a contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the ground-work of his claim. The rule is expressed in the maxim, '*in pari delicto potior est conditio defendentis.*'

Begbie v.
Phosphate
Sewage Co.,
L. R.
10 Q. B. 499.

unless
plaintiff
be not
*in pari
delicto.*

But there are exceptional cases in which a man may be relieved of an illegal contract into which he has entered; cases to which the maxim just quoted does not apply. They fall into two classes: (1) the plaintiff may have been induced *to enter into the contract by fraud or strong pressure; (2) the contract being unperformed, money paid or goods delivered in furtherance of it may be recovered. [*217]

The first class of cases is best illustrated by two decisions. In *Reynell v. Sprye* Sir Thomas Reynell was

1 D. M. & G.
660.

¹ Negotiable instruments given for gambling debts are void by statute in many States. Stimson, Am. St. Law, § 4182. *Lagonda N. B. v. Portner*, 46 Oh. St. 381.

induced, by the fraud of Sprye, to make a conveyance of property in pursuance of an agreement which was illegal on the ground of champerty. He sought to get the conveyance set aside in chancery. It was urged that the parties were *in pari delicto*, and that therefore his suit must fail; but the court was satisfied that he had been induced to enter into the agreement by the fraud of Sprye, and considered him entitled to relief.

Parties
not *in*
pari de-
licto,

‘Where the parties to a contract against public policy, or illegal, are not *in pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given him.’

1 D. M. & G.
p. 679.

In *Atkinson v. Denby*, the plaintiff, a debtor, offered his creditors a composition of 5s. in the pound. The defendant was one of the creditors, and his acceptance or rejection of the offer was known to be certain to determine the decision of several other creditors. He refused to assent to the composition unless the plaintiff would make him an additional payment of £50, in fraud of the other creditors. This was done: the composition arrangement was carried out, and the plaintiff sued to recover the £50, on the ground that it was a payment made by him under oppression and in fraud of his creditors. It was held that he could recover; and the Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, said, —

6 H. & N.
778.
7 H. & N.
984.

‘It is said that both parties are *in pari delicto*. It is true that both are *in delicto* because the act is a fraud upon the other creditors: but it is not *par delictum* because one has power to dictate, the other no alternative but to submit.’¹

¹ Fraud, duress, or undue influence practised by one party upon the other may entitle the latter to relief from an illegal contract. *Duval v. Wellman*, 124 N. Y. 156, H. & W. 402; *Harrington v. Grant*, 54 Vt. 236; *Poston v. Balch*, 69 Mo. 115.

The second exception relates to cases where money has been paid or goods delivered for an unlawful purpose, which has not been carried out.

*The law cannot be said to be satisfactorily settled on this point, but its present condition may [*218] be thus stated.

We must separate the cases into two groups: (1) those in which money or goods have been delivered by one party to the other, and (2) those in which money has been placed in the hands of a stakeholder.

¹ Q. B. D.
(C. A.) 300.

(1) In *Taylor v. Bowers* it was held by Mellish, L.J., that—

or there
is *locus*
poeniten-
tiae.

‘If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out: but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action.’

The case to which these words applied was a fictitious assignment of goods in fraud of creditors; before anything had been done in respect of the contemplated fraud, the assignor desired to have his goods back; he was held entitled to recover their value from one to whom they had been transferred under a bill of sale.

Hermann v.
Juchner, 15
Q. B. D. 561.

In a later case a man procured another to go bail for him on the terms that he deposited the amount of the bail in the hands of his surety as an indemnity against his possible default. He sued his surety for the money on the ground that his contract was illegal, that no illegal purpose had been carried out, that the money was still intact, and that he could recover it. The Court of Appeal^a held that the illegal object was carried out when by reason of the plaintiff's payment to his surety, the surety lost all interest in seeing that the conditions of the recognizance were performed.

⁷ Q. B. D.
548.

^a Overruling *Wilson v. Strugnell*, in which the facts were precisely similar.

In *Kearley v. Thomson*, the Messrs. Thomson, a firm of solicitors acting for the petitioning creditor of Clarke, a bankrupt, agreed with Kearley, a friend of Clarke, that in consideration of the payment of their costs they would not appear at the public examination of Clarke, nor oppose the order for his discharge. They carried out the first part of the agreement, but before any application was made for Clarke's discharge *Kearley sought to recover the money which he had paid on the ground that it was the consideration for a promise to pervert the course of justice, and that the contract was not wholly carried out.

24 Q. B. D. 742.

Limitations of the rule.

The Court of Appeal held that Kearley could not recover.

'Suppose a payment of £100 by *A* to *B* on a contract that the latter shall murder *C* and *D*. He has murdered *C* but not *D*. Can the money be recovered back? In my opinion it cannot be. I think that case illustrates and determines the present one.'

24 Q. B. D. 747.

Thus it would appear that where an illegal contract has been in part performed, money paid or goods delivered in pursuance of it cannot be recovered: where no such part performance has taken place we have the conditions to which *Taylor v. Bowers* would apply. But the authority of this case is much shaken by the opinion expressed by the Court of Appeal in *Kearley v. Thomson* that 'the application of the principle laid down in *Taylor v. Bowers* and even the principle itself, may at sometime hereafter require consideration, if not in this court, yet in a higher tribunal.'

24 Q. B. D. (C. A.) 746.

(2) There are numerous cases in which money has been placed in the hands of a stakeholder to abide the result of

¹ *Bernard v. Taylor*, 23 Ore. 416, H. & W. 407; *Tyler v. Carlisle*, 79 Me. 210, H. & W. 390; *Spring Co. v. Knowlton*, 103 U. S. 49, citing with approval *Taylor v. Bowers*. Cf. *Knowlton v. Congress Spring Co.*, 57 N. Y. 518.

a wager; in such cases the money has been held to be recoverable from the stakeholder either before or after the determination of the wager, and even after the money has been paid to the winner if the authority to pay was withdrawn before payment by the party seeking to recover.¹

It does not appear to matter whether the wager turns on the result of an unlawful transaction, or not: as
Supra, p.191. between the parties the wager is no more than a void transaction. Nor does the Gaming Act of 1892 affect the rights of the parties. Two cases will illustrate the law on this point.

Hampden put £500 into the hands of Walsh to abide the result of a bet that the earth was flat. He lost the bet, and before the money was paid he reclaimed his stake from Walsh. Walsh paid it to the winner and was held liable to repay the amount to Hampden.

Hampden
v. Walsh,
1 Q. B. D.
189.

*Pearson started a lottery styled 'The Missing
 Word Competition.' A sentence was published, [*220]
 omitting the last word, and an invitation was issued to the public, any one of whom might send a shilling and a word suitable to fill the vacant place in the sentence. Those who guessed the right word shared the sum thus collected.

Barclay v.
Pearson,
[1898] 2 Ch.
154.

The determination of the right word was reduced to an absolute uncertainty. From a number of sealed packets, each containing a word suitable to fill the gap, one was taken at hazard, and opened when all the competitors had sent in their guesses. This was the missing word.

To hold such a lottery was unlawful, and Pearson exposed himself to a penalty under 42 Geo. III. c. 119; but as between the various contributors the transaction was a simple wager in which each man deposited a shilling with a stakeholder to abide the chance of his guess.

¹ *Fisher v. Hildreth*, 117 Mass. 558; *Lewis v. Bruton*, 74 Ala. 317; *Bernard v. Taylor*, *supra*; *Love v. Harvey*, 114 Mass. 80, H. & W. 324.

The payments in one competition amounted to £23,000, and those who guessed the right word were 1358 in number: but before their shares could be paid over to them the competition was alleged to be illegal, and the money was paid into court. Stirling, J., found that the transaction was a lottery, and was unlawful; that the court could not aid in the distribution of the fund, but that each contributor might recover his shilling from Pearson, to whom he ordered the entire sum to be repaid in order that he might meet any legal claim.

These cases do not conflict with the principle of *Read v. Anderson*, nor with the decision in *Kearley v. Thomson*. The person employed is only a stakeholder and cannot suffer by the revocation of his authority; the wager which is the object of the transaction is only void, not illegal, and so would not be affected by the unlawfulness of the event which is the subject of the wager; nor does the Gaming Act of 1892 affect the liabilities of a stakeholder.¹

Hastelow v. Jackson,
S B. & C. 225.
O'Sullivan v. Thomas,
[1895] 1 Q.B.
698.

[*221] *THE MEANING OF THE TERMS 'VOID,' 'VOID-
ABLE,' 'UNENFORCEABLE.'

Void, void-
able, and
unenforce-
able con-
tracts.

In concluding the subject of the formation of contract we may ask what is the meaning of the terms which we use to indicate flaws or defects in a contract.

'Void' means destitute of legal effect.

An alleged contract may be void on the face of it, or proof may be needed that it is void. Where offer and acceptance do not correspond in terms, or where there is an agreement to commit a crime, no proof is required; where there is a mistake as to the identity of the thing contracted for, or an agreement to buy goods other than necessities is made by an infant, the mistake, or the

Contracts
void,

¹ The distinction between void and illegal contracts seems not to be recognized in this country. *Harvey v. Merrill*, 150 Mass. 1, H. & W. 383.

infancy must be proved: otherwise the parties might be bound by a transaction which was good on the face of it.

But this does not alter the character of the transaction, as appears when we compare that which is *void* with that which is *voidable*.¹

voidable.

'*Voidable*' means capable of affirmation or rejection at the option of one of the parties.

A void contract, when shown to be void, can create no legal rights, the whole transaction is null and falls to the ground.

A voidable contract is a contract with a flaw, of which one of the parties may, if he please, take advantage. If he do not use this right within a reasonable time, so that the position of parties is altered, or if he take benefit under the contract, or if third parties acquire rights under it, his power of avoidance ceases, and he is bound by the contract.

Illustrations.

An illustration will show the essential difference between what is void and what is voidable:—

Cundy v. Lindsay,
3 App. Ca.
459.

(*a*) *A* sells goods to *X*, being led to think that *X* is *Y*; *X* sells the goods to *M*. The contract is void on the ground of mistake, and *M* acquires no right to the goods.²

Babcock v. Lawson,
4 Q. B. D.
394.

(*β*) *A* sells goods to *X*, being led by the fraud of *X* to *think that the market is falling. *X* resells the goods to *M*, an innocent purchaser for value. *M* [*222] acquires a good title to the goods, and *A* is left to his remedy against *X* by the action of deceit.³

¹ The term 'void' is frequently used in statutes and contracts, and in the decisions of the courts, where the term 'voidable' would be more accurate. In such cases the latter term is to be substituted in determining the meaning of the statute, contract or decision. *Van Shaack v. Robbins*, 36 Iowa, 201; *Ewell v. Daggs*, 108 U. S. 143; *Bennett v. Mattingly*, 110 Ind. 197; *Somes v. Brewer*, 2 Pick. (Mass.) 183; *Anderson v. Roberts*, 18 Johns. (N. Y.) 515; *Pearsoll v. Chapin*, 44 Pa. St. 9.

² *Barker v. Dinsmore*, 72 Pa. St. 427; *Rodliff v. Dallinger*, 141 Mass. 1. Cf. *Edmunds v. Merchants', &c. Co.*, 135 Mass. 283.

³ *Rowley v. Bigelow*, 12 Pick. (Mass.) 307.

In the first of these cases the complete nullity of the contract prevents any rights arising under it if the mistaken party choose to avoid it. In the second there is a contract, and one capable of creating rights, and the person defrauded has but a limited right to set it aside.

Next we must distinguish that which is *voidable* from that which is *unenforceable*. Contracts unenforceable.

The contract of an infant under § 2 of the Infants' Relief Act may be said to be voidable, though it has not all the features of a voidable contract. The infant may sue but cannot make himself liable. The difference between that which is voidable and that which is unenforceable is a difference between substance and procedure. 'Unenforceable' is a term used of a contract which has no flaw of substance, is not affected by the fraud or incapacity of one of the parties, or the mistake or the unlawful object of both. The contract is good but it cannot be proved either by reason of lapse of time, or want of written form, or the affixing of a stamp. The Statute of Limitations may bar the remedy, or the Statute of Frauds affect the proof, but the deficiency can be satisfied by acknowledgment of the right affected by lapse of time, or by writing where the Statute of Frauds is in question, or by the supply of the missing stamp: the infant cannot make himself liable.

PART III.

THE OPERATION OF CONTRACT.

WE come now to deal with the effects of a valid contract when formed, and to ask, To whom does the obligation extend? Who have rights and liabilities under a contract?

And then this further question arises, Can these rights and liabilities be assigned or pass to others than the original parties to the contract?

In answer to these questions we may lay down two general rules.

(1) No one but the parties to a contract can be bound by it or entitled under it.

(2) Under certain circumstances the rights and liabilities created by a contract may pass to a person or persons other than the original parties to it, either (*a*) by act of the parties, or (*β*) by rules of law operating in certain events.

These two rules seem at first to look like one rule subject to certain exceptions, but they are in fact distinct. The parties cannot, by their agreement, confer rights or impose liabilities, in respect of the agreement, upon any but themselves. But they may by certain methods and under certain circumstances drop out of the obligation so created, and be replaced by others who assume their rights or liabilities under the contract.

Thus — (1) If John Doe contracts with Richard Roe, their contract cannot impose liabilities or confer rights upon John Styles.

(2) But there are circumstances under which John Doe or Richard Roe may substitute John Styles for himself as a party to the contract, and there are circumstances under which the law would operate to effect this substitution.

CHAPTER I.

The Limits of the Contractual Obligation.

THE general rule that a person who is not a party to a contract cannot be included in the rights and liabilities which the contract creates — cannot sue or be sued upon it — is an integral part of our conception of contract. A contract is an agreement between two or more persons, by which an obligation is created, and those persons are bound together thereby. If the obligation takes the form of a promise by *A* to *X* to confer a benefit upon *M*, the legal relations of *M* are unaffected by that obligation. *He* was not a party to the agreement; *he* was not bound by the *vinculum juris* which it created; the breach of that legal bond cannot affect the rights of a party who was never included in it.

Contract cannot confer

rights

or liabilities on a third party.

Nor, again, can liability be imposed on such a third party. It is an essential feature of contract as opposed to other forms of obligation, that the restraint which it imposes on individual freedom is voluntarily created by those who are subject to it — that it is the creature of agreement.

The relation of principal and agent may from one point of view be held to form an exception to these rules. It needs at any rate a separate chapter.

A trust has this in common with contract, that it originates in agreement, and that among other objects it aims at creating obligations. If we could place a trust upon the precise footing of contract we might say that it formed a very real and substantial exception to the general rule *which we have laid down. Doubtless the

Trustee and *cestui que* trust.

[*225]

creator of a trust and the trustee do, by agreement,

bring rights into existence which a third party, the *cestui que* trust, may enforce. But we will set aside trusts from the discussion, and with reason. For contract differs from other forms of agreement in having for its sole and direct object the creation of an obligation. The contractual obligation differs from other forms of obligation mainly in springing from the voluntary act of the parties obliged. A trust and the obligations resulting from a trust correspond to neither of these characteristics. The *agreement* which creates a trust has many other objects besides the creation of obligations, and these objects may include conveyance, and the subsequent devolution of property. The *obligation* which exists between trustee and *cestui que* trust does not come into existence by the act of the parties to it. It is better therefore, having noted the similarities between the contractual and the fiduciary obligation, to dismiss the latter altogether from our inquiries.

§ 1. *A man cannot incur liabilities from a contract to which he was not a party.*

(1) Contract cannot impose liability upon a third party.

(i) Paying another's debt.

Durnford v. Messiter, 5 M. & S. 446.

This proposition is a part of a wider rule to the effect that liability *ex contractu* or *quasi ex contractu* cannot be imposed upon a man otherwise than by his act or consent. *A* cannot by paying *X*'s debts unasked, make *X* his debtor; 'a man cannot, of his own will, pay another man's debt without his consent and thereby convert himself into a creditor.'

And in like manner *A* and *M* cannot, by any contract into which they may enter, thereby impose liabilities upon

¹ *South Scituate v. Hanover*, 9 Gray (Mass.), 420. But the debtor may plead the payment as an estoppel against the creditor. *Crumlish's Adm'r v. Central Improvement Co.*, 38 W. Va. 390, H. & W. 412; cf. *Muller v. Eno*, 14 N. Y. 597, 605-6. Though if he does so, it seems he thereby ratifies the payment as one made in his behalf and becomes liable to the one paying. *Neely v. Jones*, 16 W. Va. 625.

X. The Messrs. Thomlinson employed X, a firm of brokers, to transport goods from London to Amsterdam. X agreed with Schmaling to put the whole conduct of the transport into his hands; he did the work and sued the Messrs. Thomlinson for his expenses and commission. It was held that they were not liable, inasmuch as there was no privity between them and Schmaling; that is to say, [226] that there was nothing either by *writing, words, or conduct to connect them with him in the transaction. X had been employed by them to do the whole work, and there was 'no pretence that the defendants ever authorised them to employ any other to do the whole under them: the defendants looked to X only for the performance of the work, and X had a right to look to the defendants for payment, and no one else had that right.'¹

Schmaling v. Thomlinson, 6 Taunt. 147.

(ii) But does a contract impose a duty on third parties? Including breach of contract.

A contract cannot impose the burdens of an obligation upon one who was not a party to it; yet a duty rests upon persons, though extraneous to the obligation, not to interfere, from interested or malicious motive, with its due performance. I speak of duty as that necessity which rests upon all alike to respect the rights which the law sanctions; and reserve the term obligation for the special tie which binds together definite, assignable members of the community.

In *Lumley v. Gye*, the plaintiff, being the manager of an opera house, engaged a singer to perform in his theatre and nowhere else. The defendant induced her to break her contract. Lumley sued Gye for procuring this breach, and the questions raised took the following form. It was

2 E. & B. 216.

¹ An agent cannot render his principal liable to a sub-agent, or the sub-agent to the principal, unless the principal has authorized the appointment of a sub-agent. *Fairchild v. King*, 102 Calif. 320. It is often a nice question as to whether there is such authority to create a contract for the principal with the sub-agent. *Exchange Nat. Bk. v. Third Nat. Bk.*, 112 U. S. 276; *Guelich v. National State Bank*, 56 Iowa, 434; *Dun v. City Nat. Bk.*, 58 Fed. Rep. 174; *Huffcut on Agency*, §§ 92-95.

argued that one party to a contract might sue any one who induced the other party to the contract to break it. And if that were not so, it was argued that an action would still lie for inducing a servant to quit the service of his master.

Peculiar relations of master and servant.

How far applicable to case of *Lumley v. Gye*?

The relations of master and servant have always given the master a right of action against one who enticed away his servant, and so the court was called upon to answer two questions: Does an action lie for procuring a breach of any contract? if not, then does the special rule applicable to the contract of master and servant apply to the manager of a theatre and the actors whom he engages?

The majority of the court answered both these questions in the affirmative.^a

6 Q. B. D. 388.

2 E. & B. 216.

*No similar case arose until 1881, when *Bowen v. Hall* came before the Court of Appeal, offering pre-^[*227]cisely the same points for decision as *Lumley v. Gye*. The majority of the court, setting aside the question whether the relation of master and servant affected the rights of the parties, laid down a broad principle that a man who induces one of two parties to a contract to break it, intending thereby to injure the other, or to obtain a benefit for himself, does that other an actionable wrong. This decision settled a question which, despite the case of *Lumley v. Gye*, must be considered to have remained open till 1881. The parties to a contract enjoy rights *in rem* as well as rights *in personam*. The obligation binds the parties; the duty to respect the contractual tie rests upon all the world.

[1898] 1 Q.B. (C. A.) 715.

Temperton v. Russell carries the law a stage further. This was an action brought against the officers of certain trades unions for procuring the breach of contracts made with the plaintiff, and further for inducing persons not to

^a In the elaborate dissenting judgment of Coleridge, J., the exception which the law of master and servant seems to have engrafted upon the common law is traced by the learned judge, in a detailed historical argument, to the Statutes of Labourers, and is held to be inapplicable to the case of a theatrical performer.

make contracts with the plaintiff. The first of these causes of action differs only from the cases already cited in the fact that the defendants' object was not to benefit themselves but solely to injure the plaintiff. The second takes us outside the law of contract. The Court of Appeal held that both causes of action were good, and we may now regard it as settled that an actionable wrong is committed by one who, with intent to injure, induces others not to enter into contracts with the party complaining or to break contracts made.¹

Flood v. Jackson, [1895] 2 Q.B. (C. A.) 27.

§ 2. *A man cannot acquire rights under a contract to which he is not a party.*

This rule needs fuller explanation than the one which we have just been discussing. It is contrary to the common sense of mankind that *M* should be bound by a contract made between *X* and *A*. But if *A* and *X* make a contract in which *X* promises to do something for the benefit of *M*, all three may be willing that *M* should have all the rights of an actual *contracting party; or if [*228] *A*, and a group of persons which we will call *X*, enter into a contract, it might be convenient that *M* should be

(2) Contract cannot confer rights on a third party.

¹ The American cases generally agree that inducing a servant to quit his employment is actionable; and many cases support the broader doctrine that unjustifiably inducing the breach of any contract is actionable, although what would amount to justification is uncertain. *Angle v. Chicago &c. Ry.*, 151 U. S. 1, 13-15; *Jones v. Stanly*, 76 N. C. 355, H. & W. 418; *Walker v. Cronin*, 107 Mass. 555, H. & W. 416; *Chipley v. Atkinson*, 23 Fla. 206; *Bixby v. Dunlap*, 56 N. H. 456. But some authorities hold that, aside from the case of master and servant under the statutes, there is no action for inducing breach of contract unless unlawful means are used, as threats, violence or fraudulent misrepresentations, so that the breach is involuntary on the part of the one committing it; and that it is not sufficient to show that the defendant acted maliciously. *Bourlier Brothers v. Macauley*, 91 Ky. 135 (actress); *Chambers v. Baldwin*, *Ib.* 121 (contract of sale); *Boyson v. Thorn*, 98 Calif. 578 (contract for lodgings); *Ashley v. Dixon*, 48 N. Y. 430 (contract for sale of land).

able to sue on behalf of the multitude of which *X* consists.

If *A* makes a promise to *X*, the consideration for which is a benefit to be conferred on *M* by *X*, this cannot confer a right of action on *M*. Such is the rule of English law.

Easton promised *X* that if *X* would work for him he would pay a sum of money to Price. The work was done and Price sued Easton for the money. It was held that he could not recover because he was not a party to the contract.

The judges of the Queen's Bench stated in different forms the same reason for their decision. Lord Denman, C. J., said that the plaintiff did not 'show any consideration for the promise moving from him to defendant.' Littledale, J., said, 'No privity is shown between the plaintiff and the defendant.' Taunton, J., that it was 'consistent with the matter alleged in the declaration that the plaintiff may have been entirely ignorant of the arrangement between *X* and the defendant:' and Patteson, J., that there was *no promise to the plaintiff alleged.*¹

Price v.
Easton, 4 B.
& A. 438.

¹ PROMISE FOR BENEFIT OF A THIRD PERSON. There are at least two distinct holdings upon this vexed question in the United States.

(1) *Massachusetts rule*. The later Massachusetts cases practically adopt the English rule that no action is maintainable by one for whose benefit a promise is made. *Exchange Bank v. Rice*, 107 Mass. 37; *Marston v. Bigelow*, 150 Mass. 45; *Borden v. Boardman*, 157 Mass. 410, H. & W. 435. So also Michigan. *Linneman v. Moross*, 98 Mich. 178.

(2) *New York rule*. The conclusion reached in New York by successive decisions may be thus stated: a third person (*X*) for whose benefit a promise is made by *A*, upon a consideration moving from *B*, the promisee, may maintain an action upon the promise, provided he was the person directly intended to be benefited, and provided the promisee was, at the time, the promise was given, under an existing duty or obligation to *X* which he is seeking to discharge by giving *X* the benefit of *A*'s promise. *Lawrence v. Fox*, 20 N. Y. 268, H. & W. 422; *Vrooman v. Turner*, 69 N. Y. 280. This rule with the first limitation has been generally adopted throughout the United States. It is almost universally held that if the benefit is only incidental the third

Doubts have been thrown on this rule in two sorts of case, and these we will consider, premising that the rule itself remains unshaken.

Suggested
modifications,

person cannot maintain an action. *Burton v. Larkin*, 36 Kans. 246; *Howsmon v. Trenton Water Co.*, 119 Mo. 304; *National Bank v. Grand Lodge*, 98 U. S. 123. Perhaps the only case to the contrary is *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340. The second limitation has also been expressly approved. *Jefferson v. Asch*, 53 Minn. 446. But many cases state the rule in the broadest possible terms without reference to this limitation. *Grant v. Diebold Safe and Lock Co.*, 77 Wis. 72; *Hendrick v. Lindsay*, 93 U. S. 143, 149. It is believed, however, that with few exceptions the decided cases which apply the rule apply it to facts well within the second limitation. The following are illustrations of its application: a promise by *A* to pay *B*'s creditor (*X*) in place of paying *B* himself, *Lawrence v. Fox*, *supra*; *Wood v. Moriarty*, 15 R. I. 518, H. & W. 430; a promise by an incoming partner (*A*) to pay the creditors (*X*, *Y*, etc.) of the firm of which the promisee (*B*) is an outgoing partner; *Lehow v. Simonton*, 3 Colo. 346, H. & W. 420; *Clafflin v. Ostrom*, 54 N. Y. 581; *Shamp v. Meyer*, 20 Neb. 223; a promise by a purchaser or grantee of property to pay a mortgage or lien against the property for which the seller or grantor was personally liable; *Burr v. Beers*, 24 N. Y. 178; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Hallenbeck v. Kindred*, 109 N. Y. 620; *Dean v. Walker*, 107 Ill. 540; but not where the grantor was not personally liable; *Vrooman v. Turner*, *supra*; *Durnherr v. Rau*, 135 N. Y. 219; cf. *Keller v. Ashford*, 133 U. S. 610; a promise made to a father for the benefit of a minor child. *Gooden v. Rayl*, 85 Iowa, 592; *Strong v. Marcy*, 33 Kans. 109.

(3) *Statute of Frauds*. It is generally held that the promise does not fall within the Statute of Frauds, since it is given to the debtor and not to the creditor. *Wood v. Moriarty*, *supra*. *Contra: Clapp v. Lawton*, 31 Conn. 95.

(4) *Sealed instruments*. It is also generally held that the case escapes the technical rule that only the parties to a sealed instrument can sue or be sued upon it, since the promise actually declared upon is one created by law. *Bassett v. Hughes*, 53 Wis. 319, H. & W. 428; *Hughes v. Oregon Ry. & Nav. Co.*, 11 Ore. 437. Cf. *Harms v. McCormick*, 132 Ill. 104.

(5) *Right of promisee to release promisor*. It is held that if the third party has accepted or acted upon the promise, the promisee cannot afterward release the promisor from it. *Gifford v. Corrigan*, 117 N. Y. 257; *Bassett v. Hughes*, *supra*. It has been held that the promisee may release the promisor at any time before the third party accepts or acts upon the promise. *Trimble v. Strother*, 25 Oh. St. 378.

(a) near-
ness of
kin to
promisee.

1 B. & S. 893.

(a) It was at one time thought that if the person who was to take a benefit under the contract was nearly related by blood to the promisee a right of action would vest in him. The case of *Tweddle v. Atkinson* is conclusive against this view.

M and *N* married, and after the marriage a contract was entered into between *A* and *X*, their respective fathers, that each should pay a sum of money to *M*, and that *M* should have power to sue for such sums. After the death of *A* and *X*, *M* sued the executors of *X* for the money promised to him. It was held that no action would lie. *Wightman, J.*, said:—

“Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action *upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be con- [*229] sidered a party to the consideration. The strongest of those cases is that cited in *Bourne v. Mason*, in which it was held that the daughter of a physician might maintain *assumpsit* upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.’¹

1 Ventr. 6.

1 B. & S. 897.

(6) *Effect upon promisee's liability.* It has been held that if the third party elects to avail himself of the promise, he thereby releases the promisee from further liability and must look to the promisor alone. *Bohanan v. Pope*, 42 Me. 93; *Wood v. Moriarty*, *supra*.

(7) *Statutory provisions.* Some States provide by statute that one for whose benefit a promise is made may maintain an action upon the promise. *Stimson*, Am. St. Law, §§ 4117, 4128. Most States having the reformed procedure provide that all actions shall be brought in the name of the real party in interest. It has been inferred that this provision “places the matter beyond all doubt, for the person for whose benefit the promise is made is certainly the real party in interest.” *Pomeroy*, Rem. and Rem. Rights, § 139; *Stevens v. Flannagan*, 131 Ind. 122; *Ellis v. Harrison*, 104 Mo. 270. It is difficult to see, however, in what manner this provision as to procedure can have affected the question as to whether the third person has any legal or equitable interest in the contract.

¹ See *Marston v. Bigelow*, 150 Mass. 45, 53. Cf. *Strong v. Marcy*, 33 Kans. 109; *Gooden v. Rayl*, 85 Iowa, 592.

(b) Equity judges have used language, sometimes very explicit, to the effect that 'where a sum is payable by *A B* for the benefit of *C D*, *C D* can claim under the contract as if it had been made with himself.'

The doctrine in equity.

Touche v. Metropolitan Warehousing Co., 6 Ch. 671.

Spiller v. Paris Skating Rink, 7 Ch. D. 368.

The question has most frequently arisen in cases where contracts have been made or work done on behalf of a company which has not yet come into existence. The company when formed cannot ratify such transactions^a and attempts have been made to bind it by introducing into the articles of association a clause empowering the directors to fulfil the terms of the contract, or to repay those who have given work or advanced money to promote the existence of the company.

Kelner v. Baxter, L. R. 2 C. P. 174.

Common law judges have uniformly held that no right of action accrues to the beneficiary under such a provision; and recent decisions put this matter on a plain footing and tell us when a third party may or may not sue.

Melhado v. Porto Alegre Railway Co., L. R. 9 C. P. 508.

The articles of association of a company provided that the plaintiff should be employed as its permanent solicitor. He sued the company for a breach of contract in not employing him.

Eley v. Positive Assurance Co., 1 Ex. D. (C. A.) 88.

Lord Cairns explains the nature of the *articles of association* and their relation to the *memorandum of association*. The memorandum contains the terms which confer and limit the corporate powers of the company. The articles provide for the rights of the members of the company *inter se*.

See *Ashbury Carriage Co. v. Riche*, L. R. 7 H. L. at p. 667.

'They are an agreement *inter socios*, and in that view if the introductory words are applied to article 118, it becomes a covenant between the parties to it that they will employ the plaintiff. Now so far as that is concerned it is *res inter alios acta*, the plaintiff is no [*230] party to it. This article is either a stipulation which would bind the members, or else a mandate to the directors. In either case it is a matter between the directors and shareholders, and not between them and the plaintiff.'

1 Ex. D. (C. A.), at p. 89.

^a See, as to the rules which govern ratification, Part VI. c. i.

16 Ch. D.
(C. A.) 125.

Articles of association, therefore, only bind the parties to them. In the case of the *Empress Engineering Company, A*, professing to act on behalf of the company as yet unformed, made a contract with *X* which was afterwards introduced into the company's articles of association. But the Court of Appeal held that this gave no rights to *X* against the company.

Third
party only
entitled as
cestui que
trust.

Sir G. Jessel, M.R., pointed out in the course of the argument that an agreement between two parties might well be so framed as to make one of them trustee for a third; and that some cases of this nature have created an impression that a third party who is to be benefited by a contract acquires equitable rights *ex contractu*. But if a trust is to be created in favour of a third party, there must be words amounting to a declaration of trust^a by one of the contracting parties. It is not enough that one should promise the other to pay money to a third.^b

Attempts
to enable
a third
party to
sue for
many
joint con-
tractors

L. R. 5 C. P.
568.
have uni-
formly
failed.

It has been attempted, without success, to break the general rule in the case of unincorporated companies and societies who wish to avoid bringing action in the names of all their members. To this end they introduce into their contracts a term to the effect that their rights of action shall be vested in a manager or agent. Thus in *Gray v. Pearson*, the managers of a mutual assurance company, not being members of it, were authorized, by powers of attorney executed by the members of the company, to sue upon contracts made by them as agents on behalf of the company. They *sued upon a contract so made, and it was held that they could not maintain the action, 'for the simple reason,—a reason not

L. R. 18 Eq.
11.

^a See *Richards v. Delbridge* as to what constitutes a declaration of trust. A transaction which is intended to operate as a transfer of property will not import a trust merely because it is ineffectual as a transfer, nor will a contract import a trust because its terms cannot operate as a contract.

^b For illustrations see *Murray v. Flavell* and *Rotherham Alum Co.*, 25 Ch. D. 89; 103. In the first case an agreement between two parties for the benefit of a third created a trust in favour of the third party. In the second case the third party acquired no rights.

[*231]

applicable merely to the procedure of this country, but one affecting all sound procedure,—that the proper person to bring an action is the person whose right has been violated.’ Per Willes, J., at p. 574.

The inconvenience under which bodies of this description labour has been met in many cases by the legislature. Certain companies and societies can sue and be sued in the name of an individual appointed in that behalf,^a ¹ and the Judicature Act has laid down a general rule that— Statutory relaxations of the rule.

‘Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the court to defend in such action on behalf of all parties so interested.’ Order XVI. r. 9.

But this rule is not of such general application as would at first sight appear. It is intended to apply the former practice of the Court of Chancery to actions brought in any division of the High Court. The words ‘having the same interest’ must therefore be construed in accordance with this practice. The rule in chancery was that where a number of persons were interested in ‘some beneficial proprietary right, one of them might be chosen to represent the rest for the purposes of the suit.’ The rule made under the Judicature Act does not go beyond this, nor does it apply to cases where the chancery would have had no jurisdiction before the act. Thus it has been held that one of several parties to a wrong cannot be made a representative defendant in order that the plaintiff may

^a Statutes of this nature are —

7 Geo. IV. c. 46, relating to Joint Stock Banking Companies;

7 Will. IV. and 1 Vict. c. 73, relating to companies formed under letters patent;

34 & 35 Vict. c. 31, relating to Trades Unions;

38 & 39 Vict. c. 60, relating to Friendly Societies;

and in many cases companies formed by private acts of Parliament possess similar statutory powers.

¹ See N. Y. Code Civ. Pro., § 1919; *Goodsell v. Western Union Tel. Co.*, 130 N. Y. 430.

Temperton
v. Russell,
[1898] 1 Q.B.
(C. A.) 435.

Agency
postponed.

have a wide field for the recovery of damages without the trouble of suing all the wrong-doers.

*But although *A* cannot by contract with *X* con-
fer rights or impose liabilities upon *M*, yet *A* may [*232]
represent *M*, in virtue of a contract of employment sub-
sisting between them, so as to become his mouthpiece or
medium of communication with *X*. This employment for
the purpose of representation is the contract of agency. I
have described elsewhere the difficulty of assigning to
agency a fit place in a treatise on the law of contract. I
regard it as an extension of the limits of contractual obliga-
tion by means of representation, but, since its treatment
here would constitute a parenthesis of somewhat uncouth
dimensions, I will postpone the treatment of it to the
conclusion of my book.

CHAPTER II.

The Assignment of Contract.

WE have seen that a contract cannot affect any but the parties to it. But the parties to it may under certain circumstances drop out and others take their places, and we have to ask how this can be brought about, first, by the voluntary act of the parties themselves, or one of them, secondly, by the operation of rules of law.

Assign-
ment of
contract.

§ 1. *Assignment by act of the parties.*

(1) Assign-
ment by
act of par-
ties.

This part of the subject also falls into two divisions, the assignment of liabilities and the assignment of rights, and we will deal with them in that order.

Assignment of liabilities.

A promisor cannot assign his liabilities under a contract.

(i) Liabil-
ities
cannot be
assigned.

Or conversely, a promisee cannot be compelled, by the promisor or by a third party, to accept performance of the contract from any but the promisor.

The rule seems to be based on sense and convenience. A man is not only entitled to know to whom he is to look for the satisfaction of his rights under a contract; but, to use the language of Lord Denman in *Humble v. Hunter*, 'he has a right to the benefit he contemplates from the character, credit, and substance of the person with whom he contracts.'

12 Q. B. 817.

The case of *Robson & Sharpe v. Drummond* illustrates the rule. Sharpe let a carriage to Drummond at a yearly rent
[*234] *for five years, undertaking to paint it every year and keep it in repair. Robson was in fact the part-

2 B. & A.
303.

ner of Sharpe, but Drummond contracted with Sharpe alone. After three years Sharpe retired from business, and Drummond was informed that Robson was thenceforth answerable for the repair of the carriage, and would receive the payments. He refused to deal with Robson, and returned the carriage. It was held that he was entitled to do so.

Reason
for rule.

‘The defendant,’ said Lord Tenterden, ‘may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe. . . . The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with Sharpe alone and not with any other person.’¹

2 B. & A.
307.

Excep-
tions to
the rule.

There are certain limitations to this rule. A liability may be assigned with the consent of the party entitled; but this is in effect the rescission, by agreement, of one contract and the substitution of a new one in which the same acts are to be performed by different parties.

Dacey,
Parties to
Actions, 235.

Or again, if *A* undertakes to do work for *X* which needs no special skill, and it does not appear that *A* has been selected with reference to any personal qualification, *X* cannot complain if *A* gets the work done by an equally competent person. But *A* does not cease to be liable if the work is ill done, nor can any one but *A* sue for payment.²

British
Waggon Co.
v. Lea,
5 Q. B. D.
149.

Again where an interest in land is transferred, liabilities attaching to the enjoyment of the interest may pass with it. But this arises from the peculiar nature of obligations attached to land and will be matter for separate discussion.

¹ *Accord: Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379, H. & W. 438.

² *A* may delegate to *B* the performance of the duties and assign to *A* the right to payment, remaining liable to *X* for the manner in which the work is done. *Devlin v. Mayor*, 63 N. Y. 8. See also *Rochester Lantern Co. v. Stiles &c. Co.*, 135 N. Y. 209, H. & W. 447; *La Rue v. Groezinger*, 84 Calif. 281.

Assignment of rights.

(i) AT COMMON LAW.

(ii) **Assign-
ment of
rights.**

At common law, apart from the customs of the law merchant, the benefit of a contract, or of rights of action

(a) At com-
mon law.

[*235] *arising from contract,^a cannot be assigned so as to enable the assignee to sue upon it in his own name.

Assign-
ability of
the benefit
of a con-
tract :

He must sue in the name of the assignor or his representatives ; or rather, the common law so far takes cognizance of such equitable rights as are created by the assignment that the name of the assignor may be used as trustee of the benefits of the contract for the assignee.¹

Powles v.
Innes, 11 M.
and W. 10.

Practically the only way in which rights under a contract can be transferred at common law is, not by assignment at all, but by means of a substituted agree-
ment.

at com-
mon law
only
by sub-
stituted
agree-
ment :

If *A* owes *M* £100, and *M* owes *X* £100, it may be agreed between all three that *A* shall pay *X* instead of *M*, who thus terminates his legal relations with either party. In such a case the consideration of *A*'s promise is the discharge by *M*; for *M*'s discharge of *A*, the extinguishment of his debt to *X*; for *X*'s promise, the substitution of *A*'s liability for that of *M*.²

Fairlie v.
Denton,
8 B. & C.
400.

^a This rule is sometimes expressed by saying that 'a *chose in action* is not assignable.' The term *chose in action* is one which writers have continued to use for a long time without inquiring precisely what it meant, and since, of late, inquiry has been made, there seems some doubt as to its meaning. (See Law Quarterly Review for 1893, 1894, 1895.)

Whether *chose in action* comprises personal property of an intangible character such as copyright, rights *ex contractu* before and after breach, and rights of action generally, is a matter which I will leave for the discussion of those whom it may concern. Whatever meaning is attached to the term by the disputants, it certainly includes rights under a contract and rights of action arising from breach of contract, and we have to consider how far, and under what conditions these were assignable.

¹ And the assignor cannot control the suit, though he may demand an indemnity against costs. *Webb v. Steele*, 13 N. H. 230; *Hough v. Barton*, 20 Vt. 455, H. & W. 445; *Fay v. Guynon*, 131 Mass. 31.

² *Heaton v. Angier*, 7 N. H. 397, H. & W. 442.

in cases of
debt;

But there must be ascertained sums due from *A* to *M* and from *M* to *X*; and there must also be a definite agreement between the parties, for it is the promise of each which is the consideration of those given by the others.

Cuxon v.
Chadley,
8 B. & C.
591.

A promise by a debtor to pay a third party even though afterwards it be assented to by the creditor will not enable the third party to sue for the sum promised.¹

Liversidge
v. Broad-
bent, 4 H.
& N. 608.

Again, a written authority from the creditor to the debtor to pay the amount of the debt over to a third party, even though the debtor acknowledge in writing the authority given, will not entitle the third party to sue for the amount.²

*‘There are two legal principles,’ said Martin, B., ‘which, so far as I know, have never been departed from: one is that, [*236] at common law, a debt cannot be assigned so as to give the assignee a right to sue for it in his own name, except in the case of a negotiable instrument; and that being the law, it is perfectly clear that *M* could not assign to the plaintiff the debt due from the defendant to him. . . . The other principle which would be infringed by allowing this action to be maintained is the rule of law that a bare promise cannot be the foundation of an action. . . . No doubt a debtor may, if he thinks fit, promise to pay his debt to a person other than his creditor; and if there is any consideration for the promise, he is bound to perform it. But here there was none whatever. There was no agreement to give time, or *that the debt of M should be extinguished*,—no indulgence to him or detriment to the plaintiff. There was nothing in the nature of a consideration moving from the plaintiff to the defendant, but a mere promise by the defendant to pay another man’s debt.’

Per Martin,
B., Liver-
sidge v.
Broadbent,
4 H. & N.
610.

It is thus apparent that a contract, or right of action arising from contract, cannot be assigned at common law except (1) by an agreement between the original parties to it and the intended assignee, which is subject to all the rules for the formation of a valid contract, and which is limited in its operation to the transfer of a debt; or (2)

¹ *McKinney v. Alvis*, 14 Ill. 33, H. & W. 443.

² *Jessel v. Williamsburgh Ins. Co.*, 3 Hill (N. Y.), 88, H. & W. 444.

by the rules of the law merchant under circumstances to be noted presently.

or by custom of merchants.

(ii) IN EQUITY.

Equity permits the assignment of a *chose in action*, or the rights which a man possesses under a contract, so that the assignee may sue in his own name.¹ But the rights must relate to money or property, specified or capable of being rendered specific. A right under a contract to lend money, not out of any particular fund, would seem not to be assignable, since it could only give rise to an action for unliquidated damages.^a *A fortiori* a contract for personal services would not be assignable.²

(b) Assignability of contracts in equity

But certain conditions affect the rights of the assignee.

is subject to certain conditions.

[*237] **(a)* The assignment will not be supported unless less consideration has been given by the assignee.

(*β*) It will not bind the person liable until he has received *notice*, although it is effectual as between assignor and assignee from the moment of the assignment.

(*γ*) The assignee takes subject to all such defences as might have prevailed against the assignor. In other words, the assignor cannot give a better title than he has got.

These last two propositions require some illustration.

^a This point is very fully discussed by Lord Macnaghten in *Tailby v. Official Receiver*, and the limits of assignability are indicated in *Western Wagon Co. v. West*. The cases were assignments under the Judicature Act, but assignability was assumed to be limited by previous equitable rules.

13 App. Ca. 541.
[1892] 1 Ch. 271.

¹ An assignment cannot be enforced in equity if the assignee can proceed at law in the name of his assignor, unless the legal remedy would be incomplete or inadequate. *Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.) 463, H. & W. 452; *Walker v. Brooks*, 125 Mass. 241; *New York &c. Co. v. Memphis Water Co.*, 107 U. S. 205. The two cases in which the assignment is most commonly enforced in equity are, first, the assignment of future interests, and, second, the assignment of part of a demand. *Field v. Mayor*, 6 N. Y. 179, H. & W. 453; *James v. Newton*, 142 Mass. 366.

² *Hayes v. Willio*, 4 Daly (N. Y. C. P.), 259, H. & W. 451.

Notice.

Notice. It is fair upon the person liable that he should know to whom his liability is due. So if he receive no notice that it is due to another than the party with whom he originally contracted, he is entitled to the benefit of any payment which he may make to his original creditor. A convenient illustration is furnished in the case of covenants to pay interest on a mortgage debt. If the mortgage be assigned by the mortgagee without notice to the mortgagor, and interest be afterwards paid by the mortgagor to the duly-authorized agent of the mortgagee, the money so paid, though due to the assignee, cannot be recovered by him from the debtor. We may put the case thus:—Money is due at regular intervals from *A* to *X*, and is ordinarily paid by *A* to the agent of *X*: *X* assigns his interest in the debt to *M*. *A* receives no notice but continues to pay the money to *X*'s agent: the money so paid cannot be recovered by *M* from *A*.

Williams v.
Sorrell,
4 Vesey,
389.

The *rationale* of the rule is thus expounded by Turner, L.J., in *Stocks v. Dobson*:—

4 D. M. & G.
15.

‘The debtor is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right, and can only sue in the assignor’s name. How can he sue if the debt has been paid? If a court of equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment, it would be impossible for a debtor safely *to pay a debt to his creditor. The law of the court has therefore required notice to be given to the debtor of the [*238] assignment *in order to perfect the title of the assignee.*’¹

4 D. M. & G.
at p. 16.

And the same case is authority for this further proposition, that ‘equitable titles have priority according to the priority of notice.’ The successive assignees of an obliga-

¹ *Heermans v. Ellsworth*, 64 N. Y. 159, H. & W. 457.

tion rank as to their title, not according to the dates at which the creditor assigned his rights to them respectively, but according to the dates at which they gave notice to the party to be charged.¹

Title.

‘The general rule, both at law and in equity, is that no person can acquire title, either to a *chose in action* or any other property, from one who has himself no title to it.’

And further, ‘if a man takes an assignment of a *chose in action*, he must take his chance as to the exact position in which the party giving it stands.’

The facts of the case last cited are somewhat complex, and the rule is so clear that a complicated illustration would not tend to make it clearer. It is enough that the assignee of contractual rights must take care to ascertain the exact nature and extent of those rights; for he cannot take more than his assignor has to give, or be exempt from the effect of transactions by which his assignor may have lessened or invalidated the rights assigned.²

In like manner, if one of two parties be induced to enter into a contract by fraud, and the fraudulent party assign his interest in the contract for value to X, who is wholly innocent in the matter, the defrauded party may get the contract set aside in equity in spite of the interest acquired in it by X.³

It is possible, however, that two parties to a contract may stipulate that if either assign his rights under it,

Assignee takes subject to equities.

Crouch v. Credit Foncier, L. R. 8 Q. B. 880.
Mangles v. Dixon, 3 H. L. C. 735.

Graham v. Johnson, 8 Eq. 86.

This rule may be excluded by express terms.

¹ The rule stated by the author is approved in *Van Buskirk v. Hartford Fire Ins. Co.*, 14 Conn. 141; *Clodfelter v. Cox*, 1 Sneed (Tenn.), 330; *Ward v. Morrison*, 25 Vt. 593. But the rule that the one prior in time will be protected is sustained by *Muir v. Schenck*, 3 Hill (N. Y.), 228; *Williams v. Ingersoll*, 89 N. Y. 508; *Thayer v. Daniels*, 113 Mass. 129.

² *Warner v. Whittaker*, 6 Mich. 133; *Lane v. Smith*, 103 Pa. St. 415.

³ *Holbrook v. Burt*, 22 Pick. (Mass.) 546.

such an assignment shall be 'free from equities;' that is to say, that the assignee shall not be liable to be met by such defences *as would have been valid against his assignor. It is questionable, however, whether such a stipulation would protect the assignee against the effects of fraud, or any vital defect in the formation of the original contract.

Ex parte
Asiatic
Banking
Corpora-
tion, 2 Ch.
897.

(iii) BY STATUTE.

(c) **Assign-
ment of
contract
by statute.** It remains to consider, so far as mere assignment goes, the statutory exceptions to the common law rule that a *chose in action* is not assignable.

c. 66. § 25.
sub-§ 6.

(a) The Judicature Act of 1873 gives to the assignee of any debt or legal *chose in action* all legal rights and remedies. But (1) the assignee takes subject to equities; (2) the assignment must be absolute; (3) must be in writing signed by the assignor; (4) express notice in writing must be given to the party to be charged, and the title of the assignee dates from notice.¹

Tailby v.
Official
Receiver,
13 App. Ca.
528.

The requirements of this section do not affect the rules of assignment in equity, or the rights thereby created. Here, as elsewhere, the Judicature Act has not created new rights, but has generalized equitable rules, and given legal remedies for rights which, previously, could only be enforced in the chancery. The rights which are assignable under the Judicature Act are such rights as were previously assignable in equity (*ante*, p. 236 *n.*). But a compliance with the requirements of the section gives to

¹ In many States all *choses in action* arising from contract are rendered assignable so as to vest the legal title in the assignee. Stimson, Am. St. Law, § 4031. In States having the reformed procedure an assignee must sue in his own name. *Ib.*, § 4032. But he takes subject to equities. *Ib.* The requirement that the assignment and notice must be in writing does not generally prevail in this country. See *Allen v. Brown*, 44 N. Y. 228, II. & W. 459; *Walker v. Mauro*, 18 Mo. 564.

the assignee *legal* as well as equitable rights and remedies. These requirements are more stringent since writing is not required either for the assignment or the notice in equity.

It should be further noted that the assignment operates without the consent of the party liable. In *Brice v. Bannister* the defendant received express notice of the assignment of a debt accruing from him to the assignor. He refused to be bound by the assignment and paid his debt to the assignor. He was held liable notwithstanding to the assignees for the amount assigned. 3 Q. B. D.
569.

(β) By 30 & 31 Vict. c. 144, policies of life insurance are *assignable in a form specified by the act, so Policies of
life insur-
ance.
[*240] that the assignee may sue in his own name. Notice must be given by the assignee to the insurance company, and he takes subject to such defences as would have been valid against his assignor.

(γ) By 31 & 32 Vict. c. 86, policies of marine insurance are similarly assignable; but this statute contains no requirement as to notice. Policies of
marine in-
surance.

(δ) Shares in companies are assignable under the provisions of the Companies Clauses Act, 1845, and the Companies Act, 1862. Shares.
8 & 9 Vict.
c. 16. § 14.
25 & 26 Vict.
c. 89. § 22.

(ε) Mortgage debentures issued by companies under the Mortgage Debenture Act are assignable in a form specified by the act. Mortgage
deben-
tures.
28 & 29 Vict.
c. 75.

(iv) NEGOTIABILITY.

So far we have dealt with the assignment of contracts by the rules of common law, equity and statute, and it would appear that under the most favourable circumstances the assignment of a contract binds the party chargeable to the assignee, only when notice is given to him, and subject always to the rule that a man cannot give a better title than he possesses in himself. (d) Nego-
tiability.
Assign-
ability to
be distin-
guished

We now come to deal with a class of promises the benefit of which is assignable in such a way that the promise from nego-
tiability.

may be enforced by the assignee of the benefit without previous notice to the promisor, and without the risk of being met by defences which would have been good against the assignor of the promise. In other words, we come to consider *negotiable instruments* as distinguished from *assignable contracts*.

The essential features of *negotiability* appear to be these.

Features
of nego-
tiability.

Firstly, the written promise gives a right of action to the holder of the document for the time being, though he and his holding may be alike unknown to the promisor.¹

Secondly, the holder is not prejudiced by defects in the title of his assignor; he does not hold subject to such defences as would be good against his assignor.²

**Notice* therefore need not be given to the party [241] liable, and the assignor's *title* is immaterial.

Negotia-
bility by
custom,

Rumball v.
Metropol-
itan Bank,
2 Q. B. D.
194.

Certain contracts are negotiable by the custom of merchants recognized by the courts; such are foreign and colonial bonds expressed to be transferable by delivery, and scrip certificates which entitle the bearer to become a holder of such bonds or of shares in a company.

by statute.

Bills of exchange were negotiable by the law merchant; promissory notes by 3 & 4 Anne, c. 9;³ both classes of instruments are now governed by 45 & 46 Vict. c. 61. East India bonds have been made negotiable by 51 Geo. III. c. 4.

18 & 19 Vict.
c. 111.

Bills of lading, which are affected both by the law merchant and by statute, possess some characteristics which will call for a separate consideration.

¹ *Odell v. Gray*, 15 Mo. 337; *Walker v. Ocean Bank*, 19 Ind. 247.

² *New v. Walker*, 108 Ind. 365, II. & W. 399; *Walker v. Ebert*, 29 Wis. 194, H. & W. 238.

³ 3 & 4 Anne, c. 9, has been re-enacted in substance in most American States. Stimson, Am. St. Law, § 4701. Where not formally re-enacted it is in force as a part of our common law. 3 Kent, Comm. 72.

Bills of exchange and promissory notes figure so constantly in the law of contract, and are so aptly illustrative of the nature of negotiability, that we will shortly consider their principal features.

Negotiable
instru-
ments.

A bill of exchange is an unconditional written order addressed by *M* to *X* directing *X* to pay a sum of money to a specified person or to bearer. Usually this specified person is a third person *A*, but *M* may draw a bill upon *X* in favour of himself. We must assume that the order is addressed to *X* either because he has in his control funds belonging to *M* or is prepared to give him credit; and since we are here dealing with bills of exchange merely as illustrative of negotiability, we will adopt the most usual, as it is the most convenient form for illustration.

A bill of
exchange.

45 & 46 Vict.
c. 61. § 3 (1).

M directs *X* to pay a sum of money to *A* or order, or to *A* or bearer. *M* is then called the drawer of the bill, and by drawing it he promises to pay the sum specified to *A* or to any subsequent holder if *X* do not accept the bill or, having accepted it, fail to pay.

How
drawn.

Until acceptance, *X*, upon whom the bill has been drawn, is called the drawee. When *X* has assented to pay the sum *specified, he is said to become the ac-
[*242] ceptor. Such assent must be expressed by writing on the bill signed by the acceptor, or by his simple signature. The holder is not bound to take anything but an unconditional promise to pay the sum named when due. He may take an acceptance qualified by conditions as to amount, time, or place, but this releases the drawer or any previous indorser from liability unless they assent to the qualification.

How ac-
cepted.

§§ 19, 44. :

If the bill be payable to *A* or bearer, it may be transferred from one holder to another by mere delivery: if it is payable to *A* or order, it may be transferred by indorsement.

Indorsement is an order, written upon the bill, and signed by *A*, in favour of *D*. Its effect is to assign to *D*

How in-
dorsed:

specially, the right to demand acceptance or payment of the bill from *X* when due, and in the event of default by *X* to demand it of *M*, the original drawer, or of *A*, against whom he has a concurrent remedy as being to all intents a new drawer of the bill. Every indorser therefore becomes an additional security for payment to the holder for the time being.^a

If the indorsement be simply to *D*, or to *D* or order, the bill may be assigned by *D* to whomsoever he will in the same manner as it was assigned to him.

in blank. If the indorsement be the mere signature of *A*, it is indorsed in blank, and the bill then becomes payable to bearer, that is, assignable by delivery. *A* has given his order and that addressed to no one in particular; the bill is in fact indorsed over to any one who becomes possessed of it.

A promissory note. A promissory note is a promise in writing made by *X* to *A* that he will pay a certain sum, at a specified time, or on demand, to *A* or order, or to *A* or bearer. *X*, the maker of the note, is in a similar position to that of an acceptor of a bill of exchange; and the rules as to assignment by delivery or indorsement are like those [*243] relating to a bill of exchange.

Assignability distinguished from negotiability. We may now endeavour to distinguish, by illustration from the case of instruments of this nature, the difference between *assignability* and *negotiability*.

Let us suppose that *X* makes a promissory note payable to *A* or order, and that *A* indorses it over to *D*. *D* calls upon *X* to pay the value of the note, and sues him upon default.

6 App. Ca. 1. ^a This is exemplified in *Duncan & Co. v. N. S. Wales Bank*. The bank discounted acceptances of *X* and held securities from him for so doing. Duncan indorsed to the bank an acceptance of *X* which was dishonoured when it fell due. The holder, i.e. the bank, was not entitled to the security of the indorsement, if he had security from the acceptor; and Duncan, the indorser, was relieved *pro tanto* from his liability to the bank.

In the case of an ordinary contract, *D* would be called upon to show that he had given consideration to *A* for the assignment; that notice of the assignment had been given by him to *X*; and he would then have no better title than *A*.

Consideration presumed.

In the case of negotiable instruments consideration is presumed to have been given until the contrary is shown, and notice of assignment is not required.

Notice not needed.

But suppose it turn out that the note was given by *X* to *A* for a gambling debt, or was obtained from him by fraud. The position of *D* is then modified to this extent.

As between *A* and *X* the note would be void or voidable according to the nature of the transaction, but this does not affect the rights of a *bonâ fide* holder for value, that is, a person who gave consideration for the note and had no notice of the vitiating elements in its origin. The presumptions of law under these circumstances are, (1) that *D* did not give value for the bill, but (2) that he was ignorant of the fraud or illegality; for fraud, or participation in an illegal act, is never presumed. It will be for *D* to show that he gave value for the bill, but for *X* to show that *D* knew that the bill was tainted in its origin. If *D* proves his point and *X* fails to prove his, then *D* can recover in spite of the defective title of *A* his assignor.¹ The effect of an illegal consideration for an indorsement should however be noticed. The indorsee cannot sue the indorser on the illegal contract made between them; but he can sue the acceptor, and probably a previous indorser who before the illegality had given value for the bill.

The assignee may have a better title than the assignor.

Illegal consideration for making bill:

Flower v. Sadler, 10 Q. B. D. 572, for indorsement.

A broker pledged his client's bonds, which were negotiable *by the custom of merchants, with a bank, [*244] to secure advances made to himself. The bank had

¹ Some American cases hold that the plaintiff must show that he paid value and, as further evidence of his good faith, the circumstances under which he took the tainted paper. *Canajoharie Nat. Bk. v. Diefendorf*, 123 N. Y. 191.

no notice that the bonds were not his own, or that he had no authority to pledge them: he became insolvent; the bank sold the bonds in satisfaction of the debt due, and the broker's client sued the bank. The House of Lords held that he could not recover; for (1) the bonds were negotiable, and (2) being so negotiable

‘It is of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary: and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title or the extent of his authority.’

London
Joint Stock
Bank v. Sim-
mons, [1892]
A. C. 217.
L. R. 8 Q. B.
374.

The case of *Crouch v. Credit Foncier of England* illustrates not only the nature of negotiability but the limits within which the creation of negotiable instruments is permissible.

An instru-
ment
under seal
is not ne-
gotiable.

A debenture assignable under the Companies Act and expressed to be payable to the bearer was stolen; the thief sold it to the plaintiff, and he sued the company for non-payment; the jury found that he was a *bonâ fide* holder for value of the debenture, but the court held that he could not recover, because, in spite of the wording of the debenture, it was an instrument under seal and therefore could not be, what it purported to be, a negotiable instrument assignable by delivery.¹ The plaintiff therefore suffered for the defective title of his assignor.

Had the debenture been a negotiable instrument, the plaintiff could have recovered; for, as Blackburn, J., said, in speaking of such contracts, —

‘The person who, by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bonâ fide* holder for value, he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it.’

L. R. 8 Q. B.
p. 882.

¹ In the United States corporate bonds and notes under seal are generally held to be negotiable. *Mercer County v. Huckel*, 1 Wall. (U.S.) 83; *Stevens v. Philadelphia Ball Club*, 142 Pa. St. 52. *Ante*, p. 145 n.

And the case further shows that a man cannot make an instrument negotiable merely by making it payable to bearer, nor can the custom of merchants make it negotiable by *treating it as such, if the law does not confer [*245] upon it the characteristics of negotiability. For the custom of merchants was to treat these debentures as assignable by delivery; yet when one of them came before the courts it was at once denied the incidents of negotiability as incompatible with its character of an instrument under seal.^a

Before leaving this subject it is important to notice that the doctrine of consideration does not apply to negotiable instruments as to ordinary contracts. There is usually no consideration between remote parties to a bill, such as the acceptor and the payee: there need be none between the drawer and an indorsee when, either from acceptance being refused or the bill being dishonoured by the acceptor, recourse is had to the drawer.

Consideration and negotiable instruments.

Moreover it is possible that *A* who has given no value for a bill may recover from *X* who has received no value, provided that some intermediate holder between *A* and *X* has given value for it. This is apparent if we look at the case of an '*accommodation bill*.'

45 & 46 Vict. c. 61. § 38(2).

If *A* wants to raise money, and *X* is willing to lend the use of his name and credit, *A* draws a bill upon *X* payable to himself or order. *X* accepts the bill and *A* negotiates it by indorsement to *M* who gives him value for it. *M*, who has given value, can sue *X* who has received none; but this does not fully illustrate my proposition. I must take the matter a stage further. *M*, who has given value, indorses the bill to *S* who receives it as a present, giving no value for it. It would seem that, once value is given, any subsequent holder

Scott v. Lifford, 1 Camp. 246.

^a But note the effect of § 91 of the Bills of Exchange Act in making valid the negotiable instruments of corporations issued under seal.

45 & 46 Vict. c. 61.

can sue the acceptor or any other party to the bill prior to the giving of value. And so *S*, who has given nothing, may sue *X* who has received nothing.¹

An illustration is furnished by the case of *Milnes v. Dawson*, where the drawer of a bill of exchange indorsed it without *value to the plaintiff, and then received scrip in satisfaction of the bill from the acceptor, [*246] the defendant.

‘It would be altogether inconsistent with the negotiability of these instruments,’ said Parke, B., ‘to hold that after the indorser has transferred the property in the instrument, he may, by receiving the amount of it, affect the right of his indorsee. When the property is passed, the right to sue upon the bill follows also. A bill of exchange is a chattel, and the gift is complete by delivery coupled with intention to give.’

The rules of negotiability took their rise out of the custom of merchants, which assumed that the making of a bill or note was a business transaction. Value must be given at some time in the history of the instrument; but to insist that consideration should have passed between the holder and the party sued would have defeated the object for which such instruments came into existence.

Original
object of
bills of
exchange.

For the object of a bill of exchange was to enable a merchant resident in one part of England to pay a creditor resident in another part of England, or abroad, without sending his debt in specie from one place to another. *A*, in London, owes £100 to *X* in Paris: *A* does not want to send gold or notes to France, and has no agent in Paris, or correspondent with whom he is in account, and through whom he can effect payment. But *M*, a merchant living in London, has a correspondent in Paris named *S*, who, according to the terms of business between them, will undertake to pay money on his

¹ *Grocers' Bank v. Penfield*, 69 N. Y. 502.

account at his direction. *A* therefore asks *M*, in consideration of £100, more or less according to the rate of exchange between London and Paris, to give him an order upon the correspondent *S*. Thereupon *M* draws a bill upon *S* for the required sum, in favour of *A*. *A* indorses the bill, and sends it to his creditor *X*. *X* presents it for acceptance to *S*; if all goes well the bill is accepted by *S*, and in due time paid.

Judge Chalmers thus compares the original object, and the modern English use, of bills of exchange:—

[*247] *A bill of exchange, in its origin, was an instrument by which a trade debt, due in one place, was transferred to another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction: in England it is merely an instrument of credit.'

Bills of Exchange, ed. iv. Introduction, p. liv.

It would not be well to leave the subject of negotiability without noticing the peculiar character of the instrument known as a 'bill of lading.'

Bill of lading.

A bill of lading is called 'a document of title,' 'a symbol of property;' and for the following reason. The bill of lading is a receipt by the master of a ship for goods bailed to him for delivery to *X* or his assigns.^a Of this receipt three copies are made, each signed by the master. One is kept by the consignor of the goods, one by the master of the ship, and one is forwarded to *X*, the consignee, who on receipt of it acquires a property in the goods which can only be defeated by the exercise of the vendor's equitable right of stoppage *in transitu*.^b

What it is.

If a consignee assigns a bill of lading by indorsement to a holder for value, that holder has a better right than

What rights its assignment confers.

^a See form of bill of lading, Appendix, p. 364.

^b Stoppage *in transitu* is the right of the unpaid vendor, upon learning the insolvency of the buyer, to retake the goods before they reach the buyer's possession. For the history of this right the reader is referred to the judgment of Lord Abinger, C.B., in *Gibson v. Carruthers*.

Chalmers, Sale of Goods, 58, 68-70. 8 M. & W. 339.

the consignee possessed. He has a title to the goods which overrides the vendor's right of stoppage *in transitu*, and can claim them in spite of the insolvency of the consignee and the consequent loss of the price of his goods by the consignor.

Lickbarrow
v. Mason,
1 Sm. L. C.
737 (9th ed.).

By law
merchant
proprie-
tary
rights;

His right, however, which in this respect is based upon the law merchant, is a right of property only. The assignment of the bill of lading gives a right to the goods. It did not at common law give any right to sue on the contract expressed in the bill of lading.

by 18 & 19
Vict. c.
111, con-
tractual
rights;

*The act 18 & 19 Vict. c. 111 confers this right. [*248]
The assignment of a bill of lading thereby transfers to the assignee not only the property in the goods, but 'all rights of suit' and 'all liabilities in respect of the goods, as if the contract contained in the bill of lading had been made with himself.'¹

But in respect of negotiability a bill of lading differs from the instruments with which we have just been dealing.

Its assignment transfers rights *in rem*, rights to specific goods, and these to a certain extent wider than those possessed by the assignor; therein it differs from negotiable instruments which only confer rights *in personam*.

but not
independ-
ent of as-
signor's
title.

Gurney v.
Behrend,
3 E. & B.
at p. 634.

But though the assignee is relieved from one of the liabilities of the assignor, he does not acquire proprietary rights independently of his assignor's title: a bill of lading stolen, or transferred without the authority of the person really entitled, gives no rights even to a *bonâ fide* indorsee. And again, the contractual rights conferred by statute are expressly conferred subject to equities. A bill of lading

¹ Many statutes make bills of lading and warehouse receipts transferable by indorsement in like manner as bills of exchange. Stimson, Am. St. Law, §§ 4343, 4372. These statutes have not been construed to mean that an indorsee of such a document gets thereby a better title than his indorser. *Shaw v. Railroad Co.*, 101 U. S. 557, II. & W. 460. But see *Tiedeman v. Knox*, 53 Md. 612.

then is a contract assignable without notice; it so far resembles conveyance, that it gives a title to property, but it cannot give a better title, whether proprietary or contractual, than is possessed by the assignor; subject always to this exception, that one who takes from an assignor with a good title is relieved from liability to the vendor's right of stoppage *in transitu* which might have been exercised against the original consignee.

§ 2. *Assignment of contractual rights and liabilities by operation of law.*

(2) Assignment by operation of law.

So far we have dealt with the voluntary assignment by parties to a contract of the benefits or the liabilities of the contract. But rules of law may also operate to transfer these rights or liabilities from one to another.

If *A* by purchase or lease acquire an interest in land of *M*, upon terms which bind them by contractual obligations in respect of their several interests, the assignment by either *party of his interest to *X* will, within cer-
[*249]tain limits, operate as a transfer to *X* of those obligations.

Assignment of interests in land.

Marriage, which once transferred to the husband conditionally the rights and liabilities of the wife, has little effect since the Act of 1882.

Marriage.

Representation, in the case of death or bankruptcy, effects an assignment to the executors or administrators of the deceased, or to the trustees of the bankrupt, of his rights and liabilities; but the assignment is merely a means of continuing, for certain purposes, the legal existence of the deceased or the bankrupt. The assignees of the contract take no benefit by it, nor are they personally losers by the enforcement of it against them. They represent the original contracting party to the extent of his estate and no more.

Representation.

(i) Interests in land.

Assignment of obligations upon the transfer of interests in land.

a. Covenants affecting leasehold interests.

Covenants affecting leasehold run with the land

At common law these are said to 'run with the land and not with the reversion'—that is, they pass upon an assignment of the lease, but not upon an assignment of the reversion. If the lessee assign his lease, the man to whom he assigns it would be bound to the landlord by the same liabilities and entitled to the same rights as his assignor, subject to the following rules:—

if they concern the thing demised,

See cases collected in note to Spencer's case, 1 Sm. L. C. 66, 67.

(1) Covenants in a lease which 'touch and concern the thing demised' pass to the assignee of the lessee whether or no they are expressed to have been made with the lessee 'and his assigns.' Such are covenants to repair, to leave in good repair, to deal with the land in a specified manner.¹

Minshull v. Oakes, 2 H. & N. 793.

(2) Covenants in a lease, which touch and concern the thing demised, but relate to something not in existence at the time of the lease, are *said* to pass to the assigns only if named. There is little or no authority for this rule.²

not if purely personal.

*(3) In no case does the assignee of the lessee acquire benefit or liability from merely personal or collateral covenants made between his assignor and his landlord.³ *18207*

Covenants do not run with the reversion except by statute.

The reversioner or landlord does not, at common law, by the assignment of his interest in the land convey his rights and liabilities to the assignee.

It was not till 32 Hen. VIII. c. 34 that the law in this respect was changed. By that act the assignee of the

¹ *Gordon v. George*, 12 Ind. 408, H. & W. 468; *Salisbury v. Shirley*, 66 Cal. 223.

² *Thompson v. Rose*, 8 Cow. (N. Y.) 266.

³ *Newburg Petroleum Co. v. Weare*, 44 Oh. St. 604.

reversion takes the benefits, and also incurs the liabilities, of covenants entered into with his assignor. These covenants must 'concern the thing demised' in accordance with the rules which govern covenants running with the land. The act only applies to leases under seal, but in the case of leases from year to year, payment and acceptance of rent is held to be evidence from which a jury may infer 'a consent to go on, on the same terms as before.'¹

Sm. L. C. 1.
74 (9th ed.).

Per Willes,
J., *Cornish*
v. Stubbs,
L. R. 5 C. P.
389.

Two cases will illustrate the distinction between personal, or collateral, covenants and those which concern, and are therefore assignable with, the thing demised. The first is a case of covenants running with the land, the second of covenants running with the reversion.

Hayward leased a public-house to X, covenanting for himself and his assigns that he would not build or keep a public-house within half a mile of the premises. X assigned his lease to Thomas, and Hayward broke his covenant. The covenant was personal and did not pass to the assigns of X; Thomas had no remedy.

Personal,

A

Thomas v.
Hayward,
L. R. 4
Exch. 311.

Clegg, a brewer, leased the Alexandra Hotel to Hands, who covenanted for himself and his assigns that he would buy beer only from Clegg and his assigns. Clegg retired from business, closed his brewery, and assigned his interest in the premises to one Cain. Hands refused to buy beer of Cain, and Clegg obtained an injunction to restrain him from buying beer of any one else. The Court of Appeal held that the covenant touched and concerned the thing demised.

assignable
covenants.

Clegg v.
Hands,
44 Ch.D. 503.

[*251] *And the covenant was enforced for another reason founded on a rule which will be explained on the next page. The lessee had obtained his lease on lower terms because it was subject to a restrictive covenant, and, since the covenant was not necessarily personal or

¹ *Fisher v. Deering*, 60 Ill. 114, H. & W. 470; *Crawford v. Chapman*, 17 Oh. St. 449. See Stimson, Am. St. Law, § 1352.

unassignable, the court would have restrained him from departing from it even though it had not been held to run with the land.

β. Covenants affecting freehold interests.

Covenants with owner. At common law, covenants made *with* the owner of land, that is, promises under seal made *to* the owner of land, and for his benefit, pass to his assignees, provided they touch, and concern the land conveyed and are not merely personal.¹

Dicey,
Parties to
Actions,
120-5.

X a vendor of land covenants with *A* the purchaser that he has a good right to convey the land; the benefit of such a covenant would pass from *A* to his assignees. Not so a covenant relating to some matter purely personal between *A* and *X*.

Covenants by owner.

But covenants entered into *by* the owner of land, restricting his enjoyment of the land, do not at common law bind his assignees, except he thereby create certain well-known interests, as easements and profits, recognized by law.

Stockport
Waterworks
Co. v. Potter,
3 H. & C.
300.

If a man endeavour to create restrictions on his land which are not included in the circle of rights *in re alienâ* known to the common law, he cannot affix those rights to the land so as to bind subsequent owners. The cases which deal with attempts to create 'an easement in gross' illustrate this proposition, the principle of which is thus enunciated by Lord Brougham in *Keppell v. Baily*:—

2 Mylne &
Keen, 585.

Common law view.

'It must not be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner. . . . Great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands however remote.'²

To this rule equity, regarding such covenants as

¹ *Shaber v. St. Paul Water Co.*, 30 Minn. 179, H. & W. 472.

² *Cole v. Hughes*, 54 N. Y. 444. Cf. *Middlefield v. Church Mills Knitting Co.*, 160 Mass. 267, H. & W. 476; *Conduitt v. Ross*, 102 Ind. 166; *Mott v. Oppenheimer*, 135 N. Y. 312.

[*252] binding *the person not the land, has created a group of exceptions limited in character. Where a man sells lands and covenants with the buyer that he will only use the adjoining land in a certain way, or where land has been bought or hired with similar covenants as to its use, such restrictive covenants will bind any one to whom the land is subsequently assigned with notice of their existence.^a

Equitable enforcement of restrictive covenants.

The covenants thus enforced are restrictive; they are covenants to *use or abstain from using*, and the result of the cases decided on the authority of *Tulk v. Moxhay* is 'that only such a covenant as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice.' Thus the principle cannot be applied so as to compel a lessee to enforce such covenants against his sub-tenant.

Haywood v. Brunswick Building Society, 8 Q. B. D. 410.

Hall v. Ewin, 37 Ch. D. (C. A.) 74.

The rule is thus stated by Lord Cottenham in the leading case on the subject: —

'That this court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. . . . It is said that the covenant, being one which does not run with the land, this court cannot enforce it; but the question is, *not whether the covenant runs with the land, but whether a party shall be permitted to use his land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.*'¹

Tulk v. Moxhay, 2 Ph. 771.

Assignment of contractual obligation upon marriage.

The effect of marriage, in this respect, is that if the separate estate of the wife be insufficient to satisfy her antenuptial contracts the husband is liable to the

(ii) Marriage.

45 & 46 Vict. c. 75. §§ 13, 14.

^a As to the rights conferred by such covenants upon purchasers *inter se*, and upon a purchaser against a vendor who retains a portion of the adjoining land, see *In re Birmingham Land Co. and Allday*.

[1899], 1 Ch. 348.

¹ *Tallmadge v. East River Bank*, 26 N. Y. 105; *Norcross v. James*, 140 Mass. 188.

extent of all property to which he shall have become entitled through his wife.¹

(iii) **Death.**

Assignment of contractual obligation by death.

Representatives acquire all contractual rights which affect personal estate,

Death passes to the executors or administrators of the deceased all his personal estate, all rights of action affecting *the personal estate, and all liabilities chargeable upon it. Thus covenants which are attached to [253] leasehold estate pass, as to benefit and liability, with the personalty, to the representatives, while covenants affecting freehold, as covenants for title in a conveyance of freehold property, pass to the heir or devisee of the realty.

if not dependent on personal skill or service.

But performance of such contracts as depend upon the personal services or skill of the deceased cannot be demanded of his representatives, nor can they insist upon offering such performance. Contracts of personal service expire with either of the parties to them: an apprenticeship contract is terminated by the death of the master, and no claim to the services of the apprentice survives to the executor.²

Baxter v. Burfield, 2 Str. 1266.

2 M. & S. 408.

Nor can executors sue for a breach of contract which involves a purely personal loss. In *Chamberlain v. William-son*, an executor sued for a breach of promise to marry the deceased. The promise had been broken and the right of action accrued in the lifetime of the testatrix.

¹ Formerly he was liable absolutely, and this is still so unless changed by statute, even though the statute gives the wife the sole enjoyment of her separate estate. *Platner v. Patchin*, 19 Wis. 333, H. & W. 478; *Alexander v. Morgan*, 31 Oh. St. 546. But see *Howarth v. Warmser*, 58 Ill. 48, H. & W. 479; *Wood v. Orford*, 52 Calif. 412. Statutes now generally exempt the husband except to the extent of property received through the wife. *Stinson*, Am. St. Law, § 6402.

² *Dickinson v. Calahan's Adm'rs*, 19 Pa. St. 227, H. & W. 479; *Lacy v. Getman*, 119 N. Y. 109; *Siler v. Gray*, 86 N. C. 566. Cf. *Billings's Appeal*, 106 Pa. St. 558; *Drummond v. Crane*, 159 Mass. 577. Statutes have very greatly enlarged the number of actions which survive.

But the court held that such an action could not be brought by representatives, since it was not certain that the breach of contract had resulted in damage to the estate. 'Although marriage may be regarded as a temporal advantage to the party as far as respects personal comfort, still it cannot be considered as an increase of the transmissible personal estate.' ib. p. 416.

In *Finlay v. Chirney*, a converse proposition was laid down, and the court held that no action would lie against the executors of a man who in his lifetime had broken a promise to marry. The court would not say that an action might not lie if special damage was proved, but the contract to marry was personal and did not survive to the representatives.¹ 20 Q. B. D. (C. A.) 494.

Assignment of contractual obligation by bankruptcy.

Proceedings in bankruptcy commence with the filing of a petition in the court of bankruptcy either by a creditor alleging acts of bankruptcy against the debtor or by the debtor alleging inability to pay his debts. Unless this [*254] petition prove unfounded the court makes a receiving order and appoints an official receiver who takes charge of the debtor's estate and summons a meeting of creditors.

(iv) **Bankruptcy.**
Trustee's powers: their extent, and limits.

If the creditors decide not to accept a composition, but make the debtor bankrupt, he is adjudged bankrupt and a trustee appointed.

To the trustee passes all the property of the bankrupt vested in him at the time of the act of bankruptcy or acquired by him before discharge, and the capacity for taking proceedings in respect of such property; but all that we are concerned with in respect of the rights and liabilities of the trustee is to note that—

(i) where any part of the property of a bankrupt

46 & 47 Vict. c.50. § 52 (5).

¹ *Wade v. Kalffleisch*, 58 N. Y. 282; *Chase v. Fitz*, 132 Mass. 359.

consists of things in action, such things shall be deemed to have been duly assigned to the trustee :

(ii) he may, within twelve months of his appointment, disclaim, and so discharge unprofitable contracts :

(iii) he is probably excluded from suing for 'personal injuries arising out of breaches of contract, such as contracts to cure or to marry,' even though 'a consequential damage to the personal estate follows upon the injury to the person.'¹

46 & 47 Vict.
c. 52, § 55.
53 & 54 Vict.
c. 71, § 18.
Drake v.
Beckham, 11
M. & W. 819.

¹ No general bankruptcy act has been in force in the United States since September 1, 1878. See 20 U. S. St. at L., 99. Insolvency acts appear upon the statute books of the various States, but these have no extraterritorial effect. *Gilman v. Lockwood*, 4 Wall. (U. S.) 409, H. & W. 683; *Guernsey v. Wood*, 130 Mass. 503, H. & W. 685.

PART IV.

THE INTERPRETATION OF CONTRACT.

AFTER considering the elements necessary to the formation of a contract, and the operation of a contract as regards those who are primarily interested under it, and those to whom interests in it may be assigned, it seems that the next point to be treated is the mode in which a contract is dealt with when it comes before the courts in litigation. In considering the interpretation of contract we require to know how its terms are proved; how far, when proved to exist in writing, they can be modified by evidence extrinsic to that which is written; what rules are adopted for construing the meaning of the terms when fully before the court.

Interpre-
tation of
contract.

In what
the subject
consists.

The subject then divides itself into rules relating to evidence and rules relating to construction. Under the first head we have to consider the sources to which we may go for the purpose of ascertaining the expression by the parties of their common intention. Under the second we have to consider the rules which exist for construing that intention from expressions ascertained to have been used.

Rules re-
lating (1)
to evi-
dence and
(2) to con-
struction.

CHAPTER I.

Rules relating to Evidence.

Provinces
of court
and jury.

IF a dispute should arise as to the terms of a contract made by word of mouth, it is necessary in the first instance to ascertain what was said, and the circumstances under which the supposed contract was formed. These would be questions of fact to be determined by a jury. When a jury has found, as a matter of fact, what the parties said, and that they intended to enter into a contract, it is for the court to say whether what they have said amounts to a contract, and, if so, what its effect may be. When a man is proved to have made a contract by word of mouth upon certain terms, he cannot be heard to allege that he did not mean what he said.

See p. 128.

The same rule applies to contracts made in writing. When men have put into writing any part of their contract they cannot alter by parol evidence that which they have written. When they have put into writing the whole of their contract they cannot add to or vary it by parol evidence.

Why oral
contracts
need not
be dis-
cussed.

Contracts wholly oral may, as regards this part of my subject, be dismissed at once. For the proof of a contract made by word of mouth is a part of the general law of evidence; the question whether what was proved to have been said amounts to a valid contract must be answered by reference to the formation of contract: the interpretation of such a contract when proved to have been made may be dealt with presently under the head of rules of construction.

[*257] *All that we are concerned with here is to ascertain the circumstances under which extrinsic oral evidence is admissible in relation to written contracts and contracts under seal. Such evidence is of three kinds:—

(1) Evidence as to the fact that there is a document purporting to be a contract, or part of a contract.

(2) Evidence that the professed contract is in truth what it professes to be. It may lack some element necessary to the formation of contract, or be subject to some parol condition upon which its existence as a contract depends.

(3) Evidence as to the terms of the contract. These may be incomplete, and may need to be supplemented by parol proof of the existence of other terms; or they may be ambiguous and then may be in like manner explained; or they may be affected by a usage the nature of which has to be proved.

We thus are obliged to consider —

(1) evidence as to the existence of a document;

(2) evidence that the document is a contract;

(3) evidence as to its terms.

We must note that a difference, suggested some time back, between contracts under seal and simple contracts, is illustrated by the rules of evidence respecting them. A contract under seal derives its validity from the form in which it finds expression: therefore if the instrument is proved the contract is proved, unless it can be shown to have been executed under circumstances which preclude the formation of a contract, or to have been delivered under conditions which have remained unfulfilled, so that the deed is no more than an escrow.

But 'a written contract not under seal is not the contract itself, but only evidence, the record of the contract.' Even where statutory requirements for writing exist, as under 29 Car. II. c. 3. § 4, the writing is no more than evidentiary of a previous or contemporaneous agreement.

Three matters of inquiry.

1. Proof of existence of document;
2. Of fact of agreement;

3. Of terms of contract.

Difference between formal and simple contract. p. 52.

In the first the instrument is the contract,

Wake v. Harrop,
6 H. & N.
775.

In the second the writing is only evidence of the contract.

A written offer containing all the terms of the contract signed by *A* and accepted by performance on the part of *B*, is enough *to enable *B* to sue *A* under that section. And where there is no such necessity for writing, it is optional to the parties to express their agreement by word of mouth, by action or by writing, or partly by one, and partly by another of these processes.

It is always possible therefore that a simple contract may have to be sought for in the words and acts, as well as in the writing of the contracting parties. But in so far as they have reduced their meaning to writing, they cannot adduce evidence in contradiction or alteration of it. 'They put on paper what is to bind them, and so make the written document conclusive evidence between them.'

Wake v. Harrop,
6 H. & N.
715.

(1) Proof of document.

Proof of contract under seal.

17 & 18 Vict.
c. 125. § 26.

ante, p. 50.

Of simple contract.

§ 1. *Proof of document.*

A contract under seal is proved by evidence of the sealing and delivery. Formerly it was necessary to call one of the attesting witnesses where a contract under seal was attested, but the Common Law Procedure Act, 1854, enacted that this should no longer be required save in those exceptional cases in which attestation is necessary to the *validity* of the deed. A warrant of attorney and a *cognovit* afford instances of instruments to which attestation is thus necessary.¹

In proving a simple contract parol evidence is always necessary to show that the party sued is the party making the contract and is bound by it.^a And oral evidence must

^a As a matter of practice, written contracts are commonly admitted by the parties, either upon the pleadings, or upon notice being given by one party to the other to admit such a document. Such admissions are regulated by the Judicature Act, 1875, Order xxxii. Or one party may call upon the other to produce certain documents, and upon his failing to do so, and upon proof having been given of the notice to produce, the party calling for production may give secondary evidence of the contents of the document.

¹ This is now regulated largely by statute. Even in the absence of statutes some States allow the document to be proved without

of course supplement the writing where the writing only constitutes a part of the contract. For instance: *AB* in Oxford writes to *X* in London, 'I will give £50 for your horse; if you accept send it by next train to Oxford. (Signed) *AB*.' To prove the conclusion of the contract it [*259] *would be necessary to prove the despatch of the horse. And so if *A* puts the terms of an agreement into a written offer which *X* accepts by word of mouth; or if, where no writing is necessary, he puts a part of the terms into writing and arranges the rest by parol with *X*, oral evidence must be given in both these cases to show that the contract was concluded upon those terms by the acceptance of *X*.

Supplementary oral evidence where contract written only in part,

Harris v. Rickett,
4 H. & N. 1.

So too where a contract consists of several documents which need oral evidence to show their connexion, such evidence may be given to connect them.¹ This rule needs some qualification as regards contracts of which the Statute of Frauds requires a written memorandum. The documents must in such a case contain a reference, in one or both, to the other, in order to admit parol evidence to explain the reference and so to connect them.²

or where connexion of parts do not appear from documents.

Long v. Millar,
4 C. P. D. 456.
ante, p. 67.

In contracts which are outside the statute evidence would seem to be admissible to connect documents without any such internal reference. 'I see no reason,' says Brett, J., 'why parol evidence should not be admitted to show what documents were intended by the parties to form an alleged contract of insurance.'

Edwards v. Aberayron Mutual Insurance Society,
1 Q. B. D. 587.

There are circumstances, such as the loss or inaccessibility of the written contract, in which parol evidence of

the testimony of attesting witnesses where the attestation is not necessary to the operative effect of the instrument. *Sanborn v. Cole*, 63 Vt. 590. But some cases adhere strictly to the common law rule. *Story v. Lovett*, 1 E. D. Smith (N. Y. C. P.), 153, H. & W. 500.

¹ *Colby v. Dearborn*, 59 N. H. 326, H. & W. 501; *Wilson v. Tucker*, 10 R. I. 578.

² *Coe v. Tough*, 116 N. Y. 273; *O'Donnell v. Leeman*, 43 Me. 158, H. & W. 100.

the contents of a document is allowed to be given, but these are a part of the general law of evidence, and the rules which govern the admissibility of such evidence are to be found in treatises on the subject.

(2) Proof
of fact
suspend-
ing opera-
tion of
document.

§ 2. *Evidence as to fact of agreement.*

Thus far we have dealt with the mode of bringing a document, purporting to be an agreement, or part of an agreement, before the court. But extrinsic evidence is admissible to show that the document is not in fact a valid agreement.

It may be shown by such evidence that the contract was invalid for want of consideration, of capacity of one of the *parties, of genuineness of consent, of legality [*260] of object. Extrinsic evidence is used here, not to alter the purport of the agreement, but to show that there never was such an agreement as the law would enforce.

Evidence
of con-
dition sus-
pending
operation
of con-
tract.
In the
case of a
deed:
See p. 52.

It may also be shown by extrinsic evidence that a parol condition suspended the operation of the contract. Thus a deed may be shown to have been delivered subject to the happening of an event or the doing of an act. Until the event happens or the act is done the deed remains an *escrow*, and the terms upon which it was delivered may be proved by oral or documentary evidence extrinsic to the sealed instrument.

of a simple
contract.

In like manner the parties to a written contract may agree that, until the happening of a condition which is not put in writing, the contract is to remain inoperative.

Pym v
Campbell,
6 E. & B.
570.

Campbell agreed to purchase of the Messrs. Pym a part of the proceeds of an invention which they had made. They drew up and signed a memorandum of this agreement on the express verbal understanding that it should not bind them until the approval of one Abernethie had been expressed. Abernethie did not approve of the invention, and Campbell claimed that there was no contract.

Pym contended that the agreement was binding and that the verbal condition was an attempt to vary by parol the terms of a written contract. But the court held that evidence of the condition was admissible, not to *vary a written contract* but to show that *there had never been a contract at all*.¹

The law was thus stated by Erle, J.:—

‘The point made is, that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional: and *if that had been so it would have been wrong*. But I am of opinion that *the evidence showed that in fact there was never an agreement at all*. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive, and cannot be varied by parol *evidence: but in the [*261] present case the defence begins one step earlier: the parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is, that *evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible*.’

Pym v.
Campbell,
6 E. & B. 374.

§ 3. *Evidence as to the terms of the contract.*

When we come to extrinsic evidence as affecting the terms of a contract, the admissibility of such evidence is narrowed to a small compass; for ‘according to the general law of England the written record of a contract must not be varied, or added to by verbal evidence of what was the intention of the parties.’

(3) **Evidence as to terms.**
General rule.

Blackburn, J., *Burges v. Wickham*,
3 B. & S. 696.

¹ *Reynolds v. Robinson*, 110 N. Y. 654, H. & W. 502; *Westman v. Krumweide*, 30 Minn. 313; *Blewitt v. Boorum*, 142 N. Y. 357.

We find exceptions to this rule —

Excep-
tions.

(a) in cases where terms are proved supplementary, or collateral to so much of the agreement as is in writing;

(b) in cases where explanation of the terms of the contract is required;

(c) in the introduction of usages into the contract;

(d) in the application of special equitable remedies in the case of mistake.

(a) Sup-
plement-
ary terms.

(a) It may happen that the parties to a contract have not put all its terms into writing. Evidence of the supplementary terms is then admissible, not to vary but to complete the written contract.

Jervis v.
Berridge,
8 Ch. 351.

Jervis agreed to assign to Berridge a contract for the purchase of lands from *M*. The assignment was to be made upon certain terms, and a memorandum of the bargain was made in writing, from which at the request of Berridge some of the *terms were omitted. In fact the memorandum was only made in order to [*262] obtain a conveyance of lands from *M*. When this was done and Berridge had been put in possession he refused to fulfil the omitted terms which were in favour of Jervis. On action being brought he resisted proof of them, contending that the memorandum could not be added to by parol evidence. Lord Selborne however held that the memorandum was ‘a mere piece of machinery obtained by the defendant *as subsidiary to and for the purposes of the verbal and only real agreement* under circumstances which would make the use of it, for any purpose inconsistent with that agreement, dishonest and fraudulent.’¹

Collateral
terms.

Again, evidence may be given of a verbal agreement collateral to the contract proved, subjecting it to a term unexpressed in its contents. Such a term however can

¹ *Wood v. Moriarty*, 15 R. I. 518, H. & W. 430; *Chapin v. Dobson*, 78 N. Y. 74; *Wood Mowing &c. Co. v. Gaertner*, 55 Mich. 453; *Bradshaw v. Combs*, 102 Ill. 428.

only be enforced if it be not contrary to the tenor of the written agreement. Thus, where a farmer executed a lease upon the promise of the lessor that the game upon the land should be killed down, it was held that he was entitled to compensation for damage done to his crops by a breach of such a verbal promise, though no reference to it appeared in the terms of the lease.¹

Mellish, L.J., in giving judgment said: —

‘No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself. I quite agree that an agreement of that kind is to be rather closely watched, and that we should not admit it without seeing clearly that it is substantially proved.’

Erskine v.
Adeane,
8 Ch. at
p. 766.

(b) Evidence in explanation of terms may be evidence of the identity of the parties to the contract, as where two persons have the same name, or where an agent contracts in his own name but on behalf of a principal whose

(b) Ex-
planation
of terms;
to identify
parties,
Wake v.
Harrop,
6 H. & N.
768.
or subject-
matter,

[*263] name or whose existence he does not disclose.²
Or it may be a description of the subject-matter of the contract, as in a case in which A agreed to buy of X certain wool which was described as ‘your wool,’ and the right of X to bring evidence as to the quality and quantity of the wool was disputed. The court held that it was admissible.³

Macdonald
v. Longbot-
tom, 1 E. &
E. 977.

Or such evidence may be an explanation of some word not describing the subject-matter of the contract but the

¹ *Thurston v. Arnold*, 43 Iowa, 43 H. & W. 515; *Van Brunt v. Day*, 81 N. Y. 251; *Naumberg v. Young*, 44 N. J. L. 331; *Green v. Batson*, 71 Wis. 54.

² *Andrews v. Dyer*, 81 Me. 104; *Byington v. Simpson*, 134 Mass. 169.

³ *Bulkley v. Devine*, 127 Ill. 406; *Clark v. Coffin Co.*, 125 Ind. 277.

to show
applica-
tion of
phrases.

nature of the responsibility which one of the parties assumes in respect of the conditions of the contract. Where a vessel is warranted 'seaworthy,' a house promised to be kept in 'tenantable' repair, a thing undertaken to be done in a 'reasonable' manner, evidence is admissible to show the application of these phrases to the subject-matter of the contract, so as to ascertain the intention of the parties.¹

3 B. & S.
669.

In *Burges v. Wickham*, a vessel called the Ganges, intended for river navigation upon the Indus, was sent upon the ocean voyage to India, having first been temporarily strengthened so as to be fit to meet the perils of such a voyage. Her owner insured her, and in every policy of marine insurance there is an implied warranty by the insured that the vessel is 'seaworthy.' The Ganges was not seaworthy in the sense in which that term would be ordinarily applied to an ocean-going vessel, but her condition was made known to the underwriters, and though the adventure was more dangerous than an ordinary voyage to India, there was a reasonable probability that it would be brought to a safe ending. At any rate, the underwriters took the risk at a higher premium than usual, and in full knowledge of the facts. The Ganges was lost, and the owner sued the underwriters; they defended the action on the ground that the vessel was unseaworthy in the sense in which the word was applied to an ocean voyage, and they resisted the admission of evidence to show that, with reference to this particular vessel and voyage, the term was understood in a modified sense. The evidence was *held to be admissible on grounds which are stated with [*264] the utmost clearness by Blackburn, J.:—

¹ *Ganson v. Muligan*, 15 Wis. 144, II. & W. 504; *Manchester Paper Co. v. Moore*, 104 N. Y. 680. If the parties have used the term in different senses, the contract is voidable for mistake. *Hazard v. New England Marine Ins. Co.*, 1 Sumner (U. S. C. C.), 218.

‘It is always permitted to give extrinsic evidence to apply a written contract, and show what was the subject-matter to which it refers. When the stipulations in the contract are expressed in terms which are to be understood, as logicians say, not *simpliciter*, sed *secundum quid*, the extent and the obligation cast upon the party may vary greatly according to what the parol evidence shows the subject-matter to be; but this does not contradict or vary the contract. For example, in a demise of a house with a covenant to keep it in tenantable repair, it is legitimate to inquire whether the house be an old one in St. Giles’s or a new palace in Grosvenor-square, for the purpose of ascertaining whether the tenant has complied with his covenant; for that which would be repair in a house of the one class is not so when applied to a house of the other (see *Payne v. Haine*).

16 M. & W.
541.

‘In these cases you legitimately inquire what is the subject-matter of the contract, and then the terms of the stipulation are to be understood, not *simpliciter*, but *secundum quid*. Now, according to the view already expressed, seaworthiness is a term relative to the nature of the adventure, it is to be understood, not *simpliciter*, but *secundum quid*.’

Burges v.
Wickham, 3
B. & S. 696.

Cases such as we have just described are cases of *latent* ambiguity: they may be distinguished from *patent* ambiguities, where words are omitted, or contradict one another; in such cases explanatory evidence is not admissible. Where a bill of exchange was expressed in words to be drawn for ‘two hundred pounds’ but in figures for ‘245,’ evidence was not admitted to show that the figures expressed the intention of the parties.¹

Latent
and
patent am-
biguity.

Saunderson
v. Piper,
5 Bing. N. C.
425.

(c) The usage of a trade or of a locality may be proved, and by such evidence a term may be annexed to a written contract or a special meaning may be attached to some of its provisions.

(c) Usage.

Parol evidence of a usage which adds a term to a written contract is admissible on the principle that—

‘There is a presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages.’

Hutton v.
Warren,
1 M. & W.
466.

¹ *Ganson v. Madigan*, *supra*.

Usage. *By way of illustration of a commercial usage [265]
supra, p. 263. we may take the warranty of seaworthiness which
 is held to be included in a contract of marine insurance,
 though not specially mentioned.

Wigglesworth v. Dallison,
 1 Sm. L. C.
 569.

For a local usage we may take the right of a tenant quitting his farm at Candlemas or Christmas to reap corn sown in the preceding autumn, a right which the custom of the country annexed to his lease, though the lease was under seal and contained no such term.¹

Parol evidence of usage to explain phrases in contracts, whether commercial, agricultural, or otherwise subject to known customs, is admissible on the principle that —

Brown v. Byrne,
 2 E. & B.
 716.

‘Words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. In such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract; it only ascertains it by expounding the language.’

Norden Steam Co. v. Dempsey,
 1 C. P. D.
 658.

Thus in the case of a charter-party in which the days allowed for unloading the ship are to commence running ‘on arrival’ at the ship’s port of discharge; if by custom ‘arrival’ is understood to mean arriving at a particular spot in the port, evidence may be given to show what is commonly understood to be the port.

Smith v. Wilson,
 8 B. & Ad.
 728.

And so where the lessee of a rabbit warren covenanted that he would leave 10,000 rabbits on the warren, parol evidence was admitted that, by local custom, 1000 meant 1200.²

Hills v. Evans,
 81 L. J. Ch.
 457.

Closely connected with the principle that usage may explain phrases is the admissibility of skilled evidence to explain terms of art or technical phrases when used in documents.³

Per Erle, C. J., in *Meyer v. Dresser*,
 16 C. B.,
 N. S. 660.

But in order that a usage thus proved may enlarge or explain a contract it must satisfy two requirements. It

¹ *Cooper v. Kane*, 19 Wend. (N. Y.) 386.

² *Soutier v. Kellerman*, 18 Mo. 509, H. & W. 508. Cf. *Sweeney v. Thomason*, 9 Lea (Tenn.), 359; *Walls v. Bailey*, 49 N. Y. 464.

³ *Welsh v. Huckestein*, 152 Pa. St. 27.

must be consistent with general rules of law, and it must not be inconsistent with the terms of the contract. For no usage can prevail against a rule of common law or statute;^a and *it is open to parties to exclude the [*266] usage either by express terms or by framing their contract so as to be repugnant to its operation.¹

Con-
ditions
under
which
usage
operates.

(d) In the application of equitable remedies, the granting or refusal of specific performance, the rectification of documents or their cancellation, extrinsic evidence is more freely admitted.

(d) Proved
mistake a
ground for
refusing
specific
perform-
ance.

Thus, though, as we have seen, a man is ordinarily bound by the terms of an offer unequivocally expressed, and accepted, evidence has been admitted to show that the offer was made by inadvertence and was not accepted in good faith. The case of *Webster v. Cecil* is here in point. A offered to X several plots of land for a round sum; immediately after he had despatched his offer he discovered that by a mistake in adding up the prices of the plots he had offered his land for a lower total sum than he intended. He informed X of the mistake without delay, but not before X had concluded the contract by acceptance. In resisting specific performance he was permitted to prove the circumstances under which his offer had been made.

30 Beav. 62.
ante, p. 140.

Again, where a parol contract has been reduced to writing, or where a contract for a lease or sale of lands has been performed by the execution of a lease or conveyance, evidence may be admitted to show that a term of the contract is not the real agreement of the parties.² And this

^a Nevertheless the usage of a society to compel its members to carry out contracts avoided by statute may constitute a risk against which the person employed to make such contracts is indemnified by his employer, where both know of the usage.

supra,
pp. 209, 210.

¹ *Walls v. Bailey*, supra.

² But parol evidence cannot be heard to enlarge a conveyance, though it may to diminish it. *Glass v. Hulbert*, 102 Mass. 24. Cf. *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585.

is done for two purposes and under two sets of circumstances.

Rectifica-
tion of
docu-
ments.

Earl Beau-
champ v.
Winn,
L. R. 6 H. L.
at p. 232.
Murray v.
Parker, 19
Beav. 305.

Where a contract has been reduced into writing, or a deed executed, in pursuance of a previous agreement, and the writing or deed, owing to mutual mistake, fails to express the intention of the parties, the Chancery Division will rectify the written instrument in accordance with their true intent. This may be done even though the parties can no longer be restored to the position which they occupied at the time when *the contract was made. Should the original agreement be ambiguous in its terms, [*267] extrinsic, and, if necessary, parol evidence will be admitted to ascertain the true intent of the parties.

8 Eq. 375.

4 D. & J. 250.

See Pollock,
492-501.

Correction
of mistake
which is
not
mutual.

30 Beav. 445.
23 Ch. D. 255.

ante, p. 141.

But there must have been a genuine agreement (*Mackenzie v. Coulson*): its terms must have been expressed under *mutual* mistake (*Fowler v. Fowler*): and the oral evidence, if the only evidence, must be uncontradicted.

Where mistake is not mutual, extrinsic evidence is only admitted in certain cases which appear to be regarded as having something of the character of fraud, and is admitted for the purpose of offering to the party seeking to profit by the mistake an option of abiding by a corrected contract or having the contract annulled. Instances of such cases are *Garrard v. Frankel*, or *Paget v. Marshall* cited in the chapter on Mistake. They are cases in which the offeree knows that an offer is made to him in terms which convey more than the offeror means to convey, and endeavours by a prompt acceptance to take advantage of the mistake.

It would seem that, in such cases, these corrective powers are not used unless the parties can be placed in the same position as if the contract had not been made.

86 & 87 Vict.
c. 66. § 84.

The Judicature Act reserves to the Chancery Division of the High Court a jurisdiction in 'all causes for the rectification or setting aside or cancellation of deeds or other written instruments.'

CHAPTER II.

Rules relating to Construction.

§ 1. *General rules.*

(1) General rules of construction.

WE have so far considered the mode in which the terms of a contract are ascertained: we have now to deal with the rules which govern the construction of those terms.

(1) Words are to be understood in their plain and literal meaning. This rule may lead to consequences which the parties did not contemplate, but it is followed, subject always to admissible evidence being adduced of a usage varying the usual meaning of the words.

(1) Words to be understood in their plain meaning.

Mallan v. May, 13 M. & W. 517.

(2) 'An agreement ought to receive that construction which will best effectuate the intention of the parties to be collected *from the whole of the agreement*;' 'Greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent.'

Ford v. Beech, 11 Q. B. 866.

Rules (1) and (2) might seem to be in conflict, but they come substantially to this;—men will be taken to have meant precisely what they have said, unless, from the whole tenor of the instrument, a definite meaning can be collected which gives a broader interpretation to specific words than their literal meaning would bear. The courts will not make an agreement for the parties, but will ascertain what their agreement was, if not by its general purport, then by the literal meaning of its words.¹ Sub-

(2) Subject to inference of intention from the whole document.

¹ *Reed v. Insurance Co.*, 95 U. S. 23, H. & W. 511; *Roberts v. Bonaparte*, 73 Md. 191; *Detroit Stove Works v. Perry*, 7 Fed. Cas. 555.

sidary to these main rules there are various others, all tending to the same end, the effecting of the intention of the parties so far as it can be discerned.

General
purport of
rules of
construc-
tion.

*Obvious mistakes in writing and grammar will be corrected by the court. [*269]

The meaning of general words may be narrowed and restrained by specific and particular descriptions of the subject-matter to which they are to apply.

Haigh v.
Brooks,
10 A. & E.
309.

Words susceptible of two meanings receive that which will make the instrument valid. Where a document was expressed to be given to the plaintiffs 'in consideration of your *being* in advance' to J. S., it was argued that this showed a past consideration; but the court held that the words might mean a prospective advance, and be equivalent to 'in consideration of your *becoming* in advance,' or '*on condition* of your being in advance.'

Fowkes v.
Manchester
Assurance
Association,
3 B. & S.
at p. 929.

Words are construed most strongly against the party using them. This rule is based on the principle that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing, more to his advantage.

(2) Time
and
penalties.
Stipula-
tions as to
time:

§ 2. *Rules of law and equity as to time and penalties.*

at com-
mon law:

Where a time was fixed for the performance of his undertaking by one of the parties to a contract, the common law held this to be 'of the essence of the contract.' If the condition as to time were not fulfilled, the other party might treat the contract as broken and discharged.

in equity:

Equity did not so regard conditions as to time, but inquired whether the parties when they fixed a date meant anything more than to secure performance within a reasonable time. If this was found to be their intention the contract was not held to be broken if the party who was

bound as to time did perform or was ready to perform his contract within a reasonable time.¹

The Judicature Act provides that stipulations as to time *‘shall receive in all courts the same construction and effect as they would have heretofore received in equity.’

by
statute.
36 & 37 Vict.
c. 66. § 25.
sub-§ 7.

But the effect of this enactment is confined to such contracts as fell under the cognizance of the chancery courts before the Judicature Acts. These had to do with the sale and purchase of lands. In mercantile contracts, stipulations as to time are still ‘of the essence of the contract.’ To treat them otherwise would be dangerous and unreasonable.²

Renter v.
Sala,
4 C. P. D.
(C. A.) 249.

Where the terms of a contract specify a sum payable for non-performance, it is a question of construction whether this sum is to be treated as a *penalty*, or as *liquidated damages*. The difference in effect is this.—The amount recoverable in case of a penalty is not the sum named, but the damage actually incurred. The amount recoverable as liquidated damages is the sum named as such. In construing such terms a judge will not accept the phraseology of the parties: they may call the sum specified ‘liquidated damages,’ but if the judge finds that it is in fact a penalty, he will treat it as such.³

Penalties.

A bond raises no difficulties of construction. It is in form a promise to pay a penal sum on non-performance of the condition of the bond. Beyond this we may state these general rules.

(1) If a contract is for a matter of uncertain value, and a fixed sum is to be paid for the breach of one or

¹ *Thurston v. Arnold*, 43 Iowa, 43, H. & W. 515; *Beck &c. Co. v. Colorado &c. Co.*, 10 U. S. App. 465; s. c. 52 Fed. Rep. 700; *Coleman v. Applegarth*, 68 Md. 21, H. & W. 57

² *Norrington v. Wright*, 115 U. S. 188, H. & W. 584; *Davison v. Von Lingon*, 113 U. S. 40, H. & W. 265.

³ *Streeper v. Williams*, 48 Pa. St. 450, H. & W. 517.

Law v. Local
Board of
Redditch,
[1892] 1 Q. B.
127.

more of its provisions, this sum may be recovered as liquidated damages.

Astley v.
Weldon, 2
B. & P. 346.

(2) If a contract is for a matter of certain value, and on breach of it a sum is to be paid in excess of that value, this is a penalty and not liquidated damages.

Kemble v.
Farren,
6 Bing. 147.

(3) If a contract contains a number of terms some of which are of certain and some of uncertain value, and a fixed sum is to be paid for the breach of any of them, this is a penalty.

Ward v.
Monaghan,
11 T. L. R.
(C. A.) 529.

An illustration of (1) is afforded by clauses in building contracts to pay a fixed sum weekly or *per diem* for delay; or, in the case of a tenant of a public-house, to pay to the land-lord a fixed sum as penalty on conviction for a breach of the licensing laws.¹ [*271]

An illustration of (2) would be a promise to pay a larger sum if a smaller were not paid by a fixed day. The rule is hardly reasonable, for a man might well suffer serious loss by the non-receipt of an expected payment. But the rule is fixed.

Protector
Loan Co. v.
Grice,
5 Q. B. D.
(C. A.) 592.
Wallis v.
Smith, 21
Ch. D. at
p. 257.

On the other hand, it is no penalty to provide that if a debt is to be paid by instalments the entire balance of unpaid instalments is to fall due on default of any one payment, or that a deposit of purchase money should be forfeited on breach of any one of several stipulations, some important, some trifling.²

6 Bing. 141.

An illustration of (3) is offered by *Kemble v. Farren*. Farren agreed to act at Covent Garden Theatre for four consecutive seasons and to conform to all the regulations of the theatre; Kemble promised to pay him £3 6s. 8d. for every night during those seasons that the theatre should be open for performance, and to give him one benefit night in each season. For a breach of any term

¹ *Hall v. Crowley*, 5 Allen (Mass.), 304. Cf. *Patent Brick Co. v. Moore*, 75 Calif. 205.

² *Waggoner v. Cox*, 40 Oh. St. 539; *Mathews v. Sharp*, 99 Pa. St. 560. Cf. *Chaude v. Shepard*, 122 N. Y. 397.

of this agreement by either party, the one in default promised to pay the other £1000, and this sum was declared by the said parties to be '*liquidated and ascertained damages and not a penalty* or penal sum or in the nature thereof.' Farren broke the contract, the jury put the damages at £750, and the court refused to allow the entire sum of £1000 to be recovered.¹

If the penal clause had been limited to breaches uncertain in their nature and amount, it might, as was thought, have had the effect of ascertaining the damages, for the reason above cited.² But this was not so in the present case.

'If, on the one hand, the plaintiff had neglected to make a single payment of £3 6s. 8d. per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty appears to be a contradiction in terms.'

Kemble v.
Farren,
6 Bing. 148.

¹ *Lansing v. Dodd*, 45 N. J. L. 525.

² *Cotheal v. Talmage*, 9 N. Y. 551.

PART V.

DISCHARGE OF CONTRACT.

Discharge
of con-
tract,

WE have now dealt with the elements which go to the formation of contract, with the operation of contract when formed, and with its interpretation when it comes into dispute. It remains to consider the modes in which the contractual tie may be loosed, and the parties wholly freed from their rights and liabilities under the contract. And in dealing with this part of the subject it will be proper to consider, not merely the mode in which the original contract may be discharged, but, in case of its being discharged by breach, the mode in which the right of action arising thereupon may be extinguished.

how
effected.

The modes in which a contract may be discharged would seem to be these.

Agree-
ment.

(*a*) It may be discharged by the same process which created it, mutual agreement.

Perform-
ance.

(*β*) It may be performed; and all the duties undertaken by either party may be thereby fulfilled, and all the rights satisfied.

Breach.

(*γ*) It may be broken; upon this a new obligation connects the parties, a right of action possessed by the one against the other.

Impossi-
bility.

(*δ*) It may become impossible by reason of certain circumstances which are held to exonerate the parties from their respective obligations.

Operation
of law.

(*ε*) It may be discharged by the operation of rules of law upon certain sets of circumstances to be hereafter mentioned.

CHAPTER I.

Discharge of Contract by Agreement.

CONTRACT rests on the agreement of the parties: as it is their agreement which binds them, so by their agreement they may be loosed.

Forms of discharge by agreement.

And this mode of discharge may occur in one of three forms: waiver; substituted agreement; condition subsequent.

§ 1. *Waiver.*

A contract may be discharged by agreement between the parties that it shall no longer bind them. This is a waiver, or rescission of the contract. (1)Waiver.

Such an agreement is formed of mutual promises, and the consideration for the promise of each party is the abandonment by the other of his rights under the contract. The rule, as often stated, that 'a simple contract may, *before breach*, be waived or discharged, without a deed and without consideration,' must be understood to mean that, where the contract is *executory*, no further consideration is needed for an agreement to rescind than the discharge of each party by the other from his liabilities.¹

There seems to be no authority for saying that a contract, executed upon one side, can be discharged before breach, without consideration; that where *A*. has done all that he was bound to do and the time for *X* to perform

Mere waiver of contractual rights invalid.

¹ An agreement for rescission of contract requires all the elements of an agreement for formation of contract. *Wheeler v. New Brunswick &c. R.*, 115 U. S. 29, 34.

his promise has not yet arrived, a bare waiver of his claim by A would be an effectual discharge to X.

*In fact, English law knows nothing of the abandonment of such a claim, except by release under seal, or for consideration. The plea of 'waiver' under the old system of pleading was couched in the form of an agreement between the parties to waive a contract, an agreement consisting of mutual promises, the consideration for which is clearly the relinquishment of a right by each promisee. Where a discharge by waiver is alleged as a defence in an action for breach of contract, the cases tend to show that the defendant must set up, in form or substance, a mutual abandonment of claims, or else a new consideration for the waiver.¹

Bullen and
Leake, Prec.
of Pleadings,
(ed. 3), Tit.
Waiver;
Rescission.

7 M. & W. 55.

In *King v. Gillett*, the plaintiff sued for breach of a promise of marriage; the defendant pleaded that before breach he had been *exonerated and discharged* by the plaintiff from the performance of his promise. The court held that the plea was allowable in form; 'yet we think,' said Alderson, B., 'that the defendant will not be able to succeed upon it, . . . unless he proves *a proposition to exonerate on the part of the plaintiff, acceded to by himself*; and this in effect will be a rescinding of the contract.'

ib. p. 99.

Dobson v.
Espie,
2 H. & N. 79.

Dobson sued Espie for non-payment of deposit money due upon a sale of land. Espie pleaded that, before breach of his promise to pay, Dobson had given him *leave and license* not to pay. The court held that such a plea was inapplicable to a suit for the breach of a contract, and that the defendant should have pleaded an *exoneration and discharge*; but it is difficult to see why the pleader should not have adopted the latter form of plea, unless it were that (according to the reasoning

¹ *Collyer v. Moulton*, 9 R. I. 90, II. & W. 522; *Alden v. Thurber*, 149 Mass. 271, II. & W. 630; *Kelly v. Bliss*, 54 Wis. 187.

of Alderson, B., in *King v. Gillett*) an *exoneration* means a promise to *exonerate*, which like any other promise needs consideration to support it. It is clear that in *Dobson v. Espie* the plaintiff was to obtain nothing for his alleged waiver: neither the relinquishment of a claim, nor any fresh consideration.

Finally, we have the express authority of Parke, B., in *Foster v. Dawber*, for saying that an executed contract, i. e. [*275] ^a contract in which one of the parties has performed all that is due from him, cannot be discharged by a parol waiver.

‘It is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. But an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment, where the obligation is to be performed by payment. But a promissory note or a bill of exchange appears to stand on a different footing to simple contracts.’

6 Exch. 851.

This last sentence deals with an exception to the principle just laid down, for it was a rule of the law merchant imported into the common law that the holder of a bill of exchange or promissory note might waive and discharge his rights. Such waiver needed no consideration, nor did it need to be expressed in any written form.¹

Peculiar-
ity of bills
of ex-
change
and prom-
issory
notes.

The Bills of Exchange Act has given statutory force to this rule of common law, subject to the provision that the waiver must be in writing or the bill delivered up to the acceptor.

45 & 46 Vict.
c. 61. § 62.

§ 2. *Substituted contract.*

A contract may be discharged by such an alteration in its terms as substitutes a new contract for the old one:

(2) Substi-
tuted con-
tract:

¹ No such exception is recognized in the United States unless the note or bill is surrendered. *Bragg v. Danielson*, 141 Mass. 195; *Crawford v. Millspaugh*, 13 Johns. (N. Y.) 87. The surrender of the note or bill operates by way of an executed gift. *Slade v. Mutrie*, 156 Mass. 19. See the matter of waiver discussed at large in *Jaffray v. Davis*, 124 N. Y. 164, H. & W. 187.

may be an implied discharge; and this new contract may include an express waiver of the old one, or may imply a waiver, by the introduction of new terms or new parties.¹

but the implication must be clear: But the intention to discharge the first contract must be made clear in the inconsistency of the new terms with the old. A mere postponement of performance, for the convenience of one of the parties, does not discharge the contract.

not a postponement of performance. This question has often arisen in contracts for the sale and delivery of goods, where the delivery is to extend over some time. The purchaser requests a postponement of delivery, then refuses to accept the goods at all, and then alleges that the contract was discharged by the alteration of the time of performance; that a new contract was thereby created, and that the new contract is void for non-compliance with statutory requirements as to form.

*But the courts have always recognized 'the distinction between a substitution of one agreement for another, and a voluntary forbearance to deliver at the request of another,' and will not regard the latter as affecting the rights of the parties further than this, that if a man asks to have performance of his contract postponed, he does so at his own risk. For if the market value of the goods which he should have accepted at the earlier date has altered at the latter date, the rate of damages may be assessed, as against him, either at the time when the performance should have taken place, and when by non-performance

Hickman v. Haynes,
L. R. 10 C.P.
606.

Ogle v. Earl Vane,
L. R. 2 Q. B.
275, & 3 Q. B.
272.^a

L. R. 8 Q. B.
279.

^a Willes, J., in giving judgment in the Exchequer Chamber in the case of *Ogle v. Earl Vane*, holds that by the forbearance on the part of the plaintiff, at the request of the defendant, to insist upon delivery of the goods at and after the time for the performance of the contract, an agreement arose which, though for want of consideration for the forbearance it could not furnish a cause of action, was nevertheless capable of affecting the measure of damages. He calls it an accord without a satisfaction. As to the nature of accord and satisfaction, see Part V. ch. iii. § 4 (a).

¹ *McCreery v. Day*, 119 N. Y. 1, II. & W. 524. The reader will remember that this is one of the grounds on which a promise to pay for the performance of an existing contract is sometimes enforced. *Ante*, p. 102, note 5.

the contract was broken, or when he ultimately exhausted the patience of the vendor, and definitely refused to perform the contract.¹

A contract may be discharged by substantial alteration of its terms.

A undertook certain building operations for *X*, which were to be completed by a certain date, or a sum to be paid as compensation for delay. While the building was in progress an agreement was made between the parties for additional work, by which it became impossible that the whole of the operations should be concluded within the stipulated time. It was held that the subsequent agreement was so far inconsistent with the first, as to amount to a waiver of the sum stipulated to be paid for delay.²

Substituted terms.

Thornhill v. Neats,
8 C. B., N. S.
831.

A contract may be discharged by the introduction of new parties.

Substituted parties.

ante, p. 235.

If *A* has entered into a contract with *X* and *M*, and these two agree among themselves that *M* shall retire from the contract and cease to be liable upon it, *A* may (1) insist *upon the continued liability of *M*, or (2) he [*277] may treat the contract as broken and discharged, or (3) by continuing to deal with *X* after he becomes aware of the retirement of *M* he may enter into a new contract to accept the sole liability of *X*; he cannot then hold *M* to the original contract.

‘If one partner goes out of a firm and another comes in, the debts of the old firm may, by the consent of all the three parties — the creditor, the old firm, and the new firm — be transferred to the new firm,’ and this consent

Hart v. Alexander,
2 M. & W.
484.

¹ “Where a fixed time has ceased to be an element in the contract, neither party can put the other in default without some notice or demand of performance.” *Lawson v. Hogan*, 93 N. Y. 39, 44.

² *Lawson v. Hogan*, *supra*.

Per Parke,
B.

may be implied by conduct, if not expressed in words or writing.¹

§ 3. *Provisions for discharge.*

(3) Provisions for discharge.

A contract may contain within itself the elements of its own discharge, in the form of provisions, express or implied, for its determination under certain circumstances. These circumstances may be the non-fulfilment of a condition precedent; the occurrence of a condition subsequent; or the exercise of an option to determine the contract, reserved to one of the parties by its terms.

(a) Discharge optional on non-fulfilment of a term.

The first of these three cases is somewhat near akin to discharge of contract by *breach*. But there is a difference between a non-fulfilment contemplated by the parties, the occurrence of which shall, it is agreed, make the contract determinable at the option of one, and a *breach*, or non-fulfilment not contemplated or provided for by the parties.

Head v.
Tattersall,
L. R.
7 Exch. 7.

Head bought a horse of Tattersall. The contract of sale contained, among others, these two terms: that the horse was warranted to have been hunted with the Bicester hounds, and that if it did not answer to its description the buyer should be at liberty to return it by the evening of a specified day. The horse did not answer to its description and had never been hunted with the Bicester hounds. It was returned by the day named, but it had in the meantime been injured, though by no fault of Head. Tattersall disputed Head's right to return it. But he was held entitled to do so.

* 'The effect of the contract,' said Cleasby, B., 'was to vest the property in the buyer subject to a right of rescission in a' [*278]

¹ *Collyer v. Moulton*, 9 R. I. 90, H. & W. 522; *Millerd v. Thorn*, 56 N. Y. 402. The assent of the creditor to the substitution must be established. *Ayer v. Kilner*, 148 Mass. 468. The reader will again recall that it is on the ground of substituted contract that a promise to pay an additional sum for the performance of an existing contract is sometimes sustained. *Ante*, p. 102, note 5.

particular event, when it would revert in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property reverted, and he must therefore bear the loss.¹

Head v.
Tattersall,
L. R.
7 Exch. 14.

In the second case the parties introduce a provision that the fulfilment of a condition or the occurrence of an event shall discharge them both from further liabilities under the contract.

(b) Occurrence of a specified event.

Such a provision is called a *condition subsequent*; it is well illustrated by a bond, which is a promise subject to, or defeasible upon, a condition expressed in the bond.

Condition of bond.

It may be further illustrated by the 'excepted risks' of a charter-party.^a The shipowner agrees with the charterer to make the voyage on the terms expressed in the contract, 'the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of whatsoever nature or kind, during the said voyage, *always excepted*.' The occurrence of such an excepted risk releases the shipowner from a strict performance of his contract; and if it should take place while the contract is wholly executory, and amount to a frustration of the entire enterprise, the parties are altogether discharged.

Excepted risks of charter-party.

Geipel chartered a vessel belonging to Smith to go to a spout, load a cargo of coals, and proceed thence to Hamburg: the contract contained the usual excepted risks.

Geipel v.
Smith,
L. R. 7 Q. B.
404.

^a For the form of a charter-party, see Appendix.

¹ The vendee may refuse to receive the chattel at all under such a contract if he discovers that the term is not fulfilled. *Ganson v. Madigan*, 13 Wis. 67. If he receives it he may return it upon discovering the non-fulfilment; but if he has by his own fault injured the chattel he is not entitled to return it. *Ray v. Thompson*, 12 Cush. (Mass.) 281, H. & W. 534. Such a transaction may be a sale with a right to return, or a bailment with a right to purchase. *Hunt v. Wyman*, 100 Mass. 198; *Sturm v. Boker*, 150 U. S. 312.

Before anything was done under it a war broke out between France and Germany, and the port of Hamburg was blockaded by the French fleet. Thereupon Smith, regarding a blockade as a 'restraint of princes,' refused even to load a cargo, and treated the contract as discharged. Geipel sued him for not having fulfilled such of the terms as would not have involved the risk; but the court held that the occurrence of an ex-^{*}cepted risk had made performance impossible, and that the shipowner was [*279] not bound to fulfil his preliminary undertaking.¹

Limita-
tions of
carrier's
liability.

Similar conditions enter into the contract made by a common carrier. Such a carrier is said to warrant or insure the safe delivery of goods entrusted to him; and by this we mean that he makes an almost unqualified promise to bring the goods safely to their destination or to indemnify the owner for their loss or injury. But his promise is defeasible upon the occurrence of certain excepted risks, — 'the act of God and of the Queen's enemies,' and injuries arising from defects inherent in the thing carried. This qualification is implied in every contract made with a carrier, and the occurrence of the risks exonerates him from liability for loss thereby incurred.

Nugent v.
Smith,
1 C. P. D.
423.

The 'Act of God' is a phrase which needs explanation. Its meaning is to some extent defined in *Nugent v. Smith*.

1 C. P. D.
423.

Meaning
of phrase
'Act of
God.'

The defendant, a common carrier by sea, received from the plaintiff a mare to be carried from London to Aberdeen. In the course of the voyage the ship met with rough weather, and the mare, being much frightened and struggling violently, suffered injuries of which she died.

1 C. P. D. 19. No negligence was proved against the defendant.

It was held in the Common Pleas that to constitute the 'Act of God' a loss must arise from 'such a direct and violent and sudden and irresistible act of nature' as could

Per Brett,
J., p. 424.

¹ *Graves v. The Calvin S. Edwards*, 50 Fed. Rep. 477; *Braver v. Campania Navigacion La Flecha*, 66 Fed. Rep. 776; *The Edwin I. Morrison*, 153 U. S. 199.

not be foreseen, or if foreseen prevented; and the carrier was held liable on the ground that the weather, though rough, was not so violent and unusual as to amount to an act of God thus defined, nor was the struggling of the mare of itself enough to show that she was injured from her own inherent vice.

The Court of Appeals reversed this decision. The carrier is discharged if he show that the loss could *by no reasonable precaution under the circumstances have been prevented*.

Per Mellish,
L.J., p. 441.

This exception from the general liability of the carrier of *goods is a known and understood term in every [*280] contract which he makes. The discharge hence arising must be distinguished from discharge arising from a subsequent impossibility of performance not expressly provided against in the terms of the contract. With this we shall deal hereafter.¹

Part v., ch.
iv.

Thirdly, a continuing contract may contain a provision making it determinable at the option of one of the parties upon certain terms. Such a provision exists in the ordinary contract of domestic service; the servant can terminate the contract by a month's notice, the master by a month's notice or the payment of a month's wages. And similar terms may be incorporated with other contracts between employer and employed, either expressly or by the usage of a trade.²

(c) Dis-
charge
optional
with
notice.

Nowlan v.
Ablett,
2 C. M. & R.
54.

Parker v.
Ibbetson,
4 C. B., N. S.
347.

¹ *Railroad Co. v. Reeves*, 10 Wall. (U. S.) 176. Provisions are usually inserted in insurance policies that in case of the increase of the risk by any act of the insured, as by leaving the property unoccupied, the policy shall be discharged. *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, II. & W. 531; *Kyte v. Commonwealth Union Ins. Co.*, 149 Mass. 116. Insolvency of a buyer gives a seller an option to terminate a contract for sale on credit. *Rappleye v. Racine Seeder Co.*, 79 Iowa, 220.

² No such provision attaches to contracts of service in this country. But the principle is applicable to various states of fact. Such are contracts that a party shall be 'satisfied.' *Ray v. Thompson*, *supra*;

Form of
discharge
by agree-
ment.

As regards the form needed for the expression of an agreement which purports to discharge an existing contract, there is a general rule. A contract must be discharged in the same form as that in which it is made. A contract under seal can only be discharged by agreement expressed under seal: a parol contract may be discharged by parol.

(1) In case
of contract
under seal.

Parties to a deed can only discharge their obligations by deed; but they may make a parol contract which creates obligations separate from the deed; substantially at variance with the deed: giving a right of action to which the deed furnishes no answer. *M* and *X* entered into a

Effect of
parol
contract at
variance
with deed.

contract under seal, by which *M* let to *X* certain rooms for a certain time at a rent to be ascertained in a certain way. *M* died, and *A*, his administrator, agreed with *X* by parol, that in consideration of £70 to be paid by *X* and to be taken as a reasonable rent, neither party should be called upon to perform his part under the deed. *X* failed to make the payment agreed upon, and *A* sued him upon the parol contract. It was urged on behalf of *X* that this was an attempt to vary a deed by a parol contract, the performance of which, being no discharge of the deed, would leave *X* liable to his previous obligation. But the *court held that the parol contract created a new [*281] and distinct obligation; that a performance of this

Nash v.
Armstrong,
10 C. B.,
N. S. 259.

contract would furnish an equitable answer to an action brought upon the deed; and that therefore *A* was entitled to sue upon it.¹

Per
Willes, J.,
p. 262.

(2) In case
of parol

A parol or simple contract, whether it be in writing

Adams &c. Works v. Schnader, 155 Pa. St. 394, H. & W. 549. Or that a third party shall be satisfied. *Geiger v. Western Maryland R.*, 41 Md. 4.

¹ A parol contract which operates as a discharge of a specialty is effective if acted upon. *Munroe v. Perkins*, 9 Pick. (Mass.) 298; *McCreery v. Day*, 119 N. Y. 1, H. & W. 524; *McKenzie v. Harrison*, 120 N. Y. 260; *Canal Co. v. Ray*, 101 U. S. 522; *Herzog v. Sawyer*, 61 Md. 344.

or no, may be discharged by writing or by word of mouth. contracts.
 The writing is not the agreement but the evidence of it.
 The essentials of agreement lie in the expressed intention
 of the parties, not in the writing which is the instrument
 of that expression, and the contract may be discharged
 ‘*eo ligamine quo ligatum est*,’ by a valid expression of the
 intention to put an end to it.

Where statute requires a contract to be in writing there
 is authority for saying that waiver may take place by
 word of mouth.¹ But if the discharge be not a simple
 rescission, but such an implied discharge as arises from
 the making of a new agreement inconsistent with the old
 one, then there must be writing in accordance with the
 requirements of the statute.²

A contract for the sale of goods, in writing under 29
 Car. II. c. 3. § 17, provided for the delivery of the goods
 within a certain time. A verbal agreement to extend the
 time of delivery was held to be invalid, either to make
 a new contract or to rescind the old one. ‘No rescission
 could take place by an invalid contract.’ And the same
 rule is applied to contracts under § 4 of the Statute of
 Frauds.

Goman v.
 Saltsbury,
 1 Vern. 240.
 Goss v. Lord
 Nugent,
 5 B. & A. 66.

Noble v.
 Ward, L. R.
 2 Exch. 189.

Goss v. Lord
 Nugent,
 5 B. & A. 65.

¹ *Wulschner v. Ward*, 115 Ind. 219.

² *Accord*: *Burns v. Real Estate Co.*, 52 Minn. 31; *Hill v. Blake*, 97 N. Y. 216; *Swain v. Seamens*, 9 Wall. (U. S.) 254, 271-2. *Contra*: *Cummings v. Arnold*, 3 Met. (Mass.) 486; *Stearns v. Hall*, 9 Cush. (Mass.) 31. But if the new contract is performed and the performance accepted, the question of the Statute of Frauds cannot be raised. *Long v. Hartwell*, 34 N. J. L. 116.

CHAPTER II.

Discharge of Contract by Performance.

Kinds of
perform-
ance :

WE must distinguish performance which discharges one of two parties from his liabilities under a contract, and performance which discharges the obligation in its entirety.

where
promise is
given for
executed
considera-
tion :

Where a promise is given upon an executed consideration, the performance of his promise by the promisor discharges the contract: all has been done on both sides that could be required to be done under the contract.

where
promise is
given for
promise.

Where one promise is given in consideration of another, performance by one party does no more than discharge him who has performed his part. Each must have done his part in order that performance may be a *solutio obligationis*, and so if one has done his part and not the other, the contract is still in existence and may be discharged in any one of the ways we have mentioned.

Whether the alleged performance is a discharge to the party concerned must be a question to be answered, first by ascertaining the *construction* of the contract, so as to see what the parties meant by performance, and then by ascertaining the facts, so as to see whether that which has been done corresponds to that which was promised.

But two sorts of performance should be briefly noticed : these are payment and tender.

PAYMENT.

(1) Pay-
ment as a
mode of
discharge,

Payment may be a discharge of the original contract between the parties, or of an agreement substituted for such contract.

[*283] *If in a contract between *A* and *X* the liability of *X* consists in the payment of a sum of money in a certain way or at a certain time, such a payment discharges *X* by the performance of his agreement. of original contract,

Or if *X* being liable to perform various acts under his contract, wishes instead to pay a sum of money, or, having to pay a sum of money, wishes to pay it in a manner at variance with the terms of the contract, he must agree with *A* to accept the proposed payment in lieu of that to which he may have been entitled under the original contract. The new contract discharges the old one, and payment is a performance of *X*'s duties under the new contract, and, for him, a consequent discharge. of substituted contract,

Again, where one of two parties has made default in the performance of his part of the contract, so that a right of action accrues to the other, the obligation thus formed may be discharged by *accord and satisfaction*, an agreement the consideration for which is usually a money payment, made by the party against whom the right exists, and accepted in discharge of his right by the other. of liability arising from breach of contract.

Payment, then, may be performance (1) of an original contract, or (2) of a substituted contract, or (3) of a contract in which payment is the consideration for the renunciation of a right of action. Payment is performance.

A negotiable instrument may be given in payment of a sum due, whether as the performance of a contract or in satisfaction for the breach of it; and the giving of such an instrument in payment of a liquidated or unliquidated claim is the substitution of a new agreement for the old one, but it may affect the relations of the parties in either one of two different ways. The giver of the instrument may be discharged from his previous obligation either absolutely or conditionally. Negotiable instrument as payment;

A may take the bill or note, and promise, in consideration of it, expressly or impliedly to discharge *X* altogether may be an absolute,

from his existing liabilities. *A* then relies upon his rights conferred by the instrument, and if it be dishonoured, must sue on it, and cannot revert to the original cause of action. But the presumption, where a negotiable instrument is taken in lieu of a money payment, is, that the parties intended it to be a conditional discharge. Their position then is this: *A* having certain rights against *X*, has agreed to take a negotiable instrument instead of immediate payment, or immediate enforcement of his right of action; so far *X* has satisfied *A*'s claim. But if the bill be dishonoured at maturity, the consideration for *A*'s promise has wholly failed and his original rights are restored to him. The agreement is 'defeasible upon condition subsequent;' the payment by *X* which is the consideration for the promise by *A* is not absolute, but may turn out to be, in fact, no payment at all.

Payment then consists in the performance either of an original or substituted contract by the delivery of money, or of negotiable instruments conferring the right to receive money; and in this last event the payee may have taken the instrument in discharge of his right absolutely, or subject to a condition (which will be presumed in the absence of expressions to the contrary) that, if payment be not made when the instrument falls due, the parties revert to their original rights, whether those rights are, so far as the payee is concerned, rights to the performance of a contract or rights to satisfaction for the breach of one.¹

¹ It is a question of intent as to whether a negotiable instrument is taken as absolute payment. In general the American courts follow the English in holding that the presumption, in absence of proof to the contrary, is that the instrument is taken conditionally. *Ford v. Mitchell*, 15 Wis. 304, H. & W. 536; *The Kimball*, 3 Wall. (U. S.) 37; *Cheltenham &c. Co. v. Gates Iron Works*, 124 Ill. 623. A few States hold that the presumption is that it is taken absolutely. *Smith v. Bettger*, 68 Ind. 254; *Dodge v. Emerson*, 131 Mass. 467. But in either case if there is any evidence of intent the question becomes one of fact for the jury; if there is no evidence the presumption must control. *Cheltenham &c. Co. v. Gates Iron Works*, *supra*; *Briggs v.*

Sard v.
Rhodes,
1 M. & W.
158.

or con-
ditional
discharge.

Sayer v.
Wagstaff,
5 Beav. 423.

See judg-
ment of
Parke, B.

Robinson
v. Read,
9 B. & C.
455.
Sayer v.
Wagstaff,
5 Beav. 423.

TENDER.

Tender is attempted performance; and the word is applied to attempted performance of two kinds, dissimilar in their results. It is applied to a performance of a promise to do something, and of a promise to pay something. In each case the performance is frustrated by the act of the party for whose benefit it is to take place.

Where in a contract for the sale of goods the vendor satisfies all the requirements of the contract as to delivery, and the purchaser nevertheless refuses to accept the goods, [2] **Tender** is of two kinds. *Startup v. Macdonald*, 6 M. & G. 593. *56 & 57 Vict. c. 71. § 37.*

[*285] *the vendor is discharged by such a tender of performance, and may either maintain or defend successfully an action for the breach of the contract.

But where the performance due consists in the payment of a sum of money, a tender by the debtor, although it may form a good defence to an action by the creditor, does not constitute a discharge of the debt. **Tender of payment.**

The debtor is bound in the first instance 'to find out the creditor and pay him the debt when due': if the creditor will not take payment when tendered, the debtor must nevertheless continue always ready and willing to pay the debt. Then, when he is sued upon it, he can plead that he tendered it, but he must also pay the money into court. *Walton v. Mascall*, 13 M. & W. 453. *Dixon v. Clarke*, 5 C. B. 377.

If he proves his plea, the plaintiff gets nothing but the money which was originally tendered to him, the defendant gets judgment for his costs of defence, and so is placed in as good a position as he held at the time of the tender.

Holmes, 118 Pa. St. 283; *Hall v. Stevens*, 116 N. Y. 201. The last case cited intimates that a bank draft stands upon a different footing from other instruments, but this is doubtful. Many cases hold, however, that when a third person's negotiable obligation is taken for a contemporaneous debt, the presumption is that there was a barter or exchange of property. *Whitbeck v. Van Ness*, 11 Johns. (N. Y.) 409; *Noel v. Murray*, 13 N. Y. 167.

Tender, to be a valid performance to this extent, must observe exactly any special terms which the contract may contain as to time, place, and mode of payment. And the tender must be an offer of money produced and accessible to the creditor, not necessarily of the exact sum, but of such a sum as that the creditor can take exactly what is due without being called upon to give change.^{a 1}

^a The statutes which define legal tender are these: 3 & 4 Will. IV. c. 98. § 6, enacts that Bank of England notes are legal tender for any sum above £5, except by the bank itself.

29 & 30 Vict. c. 65, gives power to the Queen to proclaim that gold coinage of colonial mints should be legal tender throughout any part of her dominions specified in the proclamation.

33 & 34 Vict. c. 10. § 4, enacts that the coinage of the mint shall be legal tender as follows:—gold coins, to any amount; silver coins, up to forty shillings; bronze coins, up to one shilling.

¹ For illustration of tenders held invalid see *Knight v. Abbott*, 30 Vt. 577; *Waldron v. Murphy*, 40 Mich. 668; *Noyes v. Wyckoff*, 114 N. Y. 204.

SUBSTANTIAL PERFORMANCE. Performance of a contract need not be literal and exact. Slight deviations not wilful may be an offset but will not defeat a recovery. *Nolan v. Whitney*, 88 N. Y. 648, H. & W. 648; *Katz v. Bedford*, 77 Cal. 319; *Hayward v. Leonard*, 7 Pick. (Mass.) 180; *Crouch v. Gutmann*, 134 N. Y. 45. But deviations which are more than slight or trivial, or which are the result of wilfulness, will defeat a recovery as for substantial performance. *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19, H. & W. 544; *Elliott v. Caldwell*, 43 Minn. 357; *Van Clief v. Van Vechten*, 130 N. Y. 571.

PERFORMANCE TO SATISFACTION OF OTHER PARTY. If *A* agrees to perform to the satisfaction of *B*, he cannot recover without fulfilling the terms of the contract. But these propositions are applicable: (1) In matters of personal taste *B* is the sole judge as to whether he is or ought to be satisfied. *Brown v. Foster*, 113 Mass. 136; *Zaleski v. Clark*, 44 Conn. 218; *Adams & Co. Works v. Schnader*, 155 Pa. St. 394, H. & W. 549. (2) In sales of goods where *A* can be put substantially in *statu quo* *B* is the sole judge. *Walter A. Wood & Co. v. Smith*, 50 Mich. 565; *Exhaust Ventilator Co. v. Chicago & Co. Ry.*, 66 Wis. 218. (3) In contracts for work and labor other than to satisfy a matter of personal taste, where the work and labor would be wholly lost to *A*, the courts tend to administer a kind of 'common law equity' and to hold that *B* must be satisfied when he ought to be satisfied. *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, H. & W. 546; *Hawkins v. Graham*, 149 Mass. 284.]

CHAPTER III.

Discharge of Contract by Breach.

IF one of two parties to a contract breaks the obligation which the contract imposes, a new obligation will in every case arise, a right of action conferred upon the party injured by the breach. Besides this, there are circumstances under which the breach will *discharge* the injured party from such performance as may still be due from him.

But, though every breach of the contractual obligation confers a right of action upon the injured party, it is not every breach that will discharge him from doing what he has undertaken to do under the contract. The contract may be broken wholly or in part; and if in part, the breach may or may not be sufficiently important to operate as a discharge; or, if it be so, the injured party may choose not to regard it as a breach, but may continue to carry out the contract, reserving to himself the right to bring action for such damages as he may have sustained. It is often very difficult to ascertain whether or no a breach of one of the terms of a contract discharges the party who suffers by it.

By *discharge* we must understand, not merely the right to bring an action upon the contract because the other party has not fulfilled its terms, but the right to consider oneself exonerated from any further performance under the contract, — the right to treat the legal relations arising from the contract as having come to an end, and given place to a new obligation, a *right of action*.

Breach of contract.

Its result.
Breach always gives right of action, not always a discharge.

Discharge indicated by old forms of pleading.

*The discharge of contract is indicated with some precision by the pleadings in use before the Judicature Acts. Many of the cases which illustrate this part of the subject turn upon questions of pleading, and we shall find that the understanding of the remedy, as often happens, is a material assistance to the ascertainment of the right. At the risk of a digression I will turn for a moment to this aspect of the question before us. [*287]

(1) Results of breach.

§ 1. *Position of parties where a contract is discharged by breach.*

Exoneration from performance.

In a contract between *A* and *X*, a breach by *X* might be considered to be a discharge of the contract if *A*, in bringing action upon it, was not required to allege that he had performed or endeavoured to perform that which was still due from him under the contract; or if *X* could not successfully use such non-performance by *A* either as a cause of action or a ground of defence.

Right to sue in *indebitatus assumpsit*.

And the test of such discharge by the default of *X* was the acquisition of a right by *A* to sue for the value of what he had done, using the form of pleading known as *indebitatus assumpsit*. By this was set up a new contract arising from the use of money, goods, or services offered by the plaintiff and accepted by the defendant.

This needs a short explanation.

Nature of the *indebitatus* counts.

Before the Judicature Acts came into operation, it was possible for a plaintiff who sued on a contract arising on consideration executed, that is a promise, acted or uttered, to pay for money, goods, or services offered and accepted, to state his case in certain short forms known as the *indebitatus* counts. These, which were an adaptation of the action of *assumpsit* to the subject-matter of the action of *debt*, merely stated a money claim existing for money due, goods supplied, or services rendered.

In certain cases these counts were applicable to a claim arising out of a special contract, that is a contract arising upon express promises made upon either side, but they were so applicable only where the contract was *discharged by breach*. When applicable to special contract.

If *A* had performed his promise in a contract made with *X* and nothing more remained for him to do, and if *X* made default in the performance due from him, either wholly or in a vital term of his promise, *A* might sue *X* not only upon the promise broken but upon a new and distinct contract arising upon the offer of that which he had done and its acceptance by *X*. The form of this last cause of action was *indebitatus assumpsit, X being indebted must be taken to have promised*. And this form was only applicable to a special contract when performed wholly or in part by one side and absolutely broken and so discharged on the other.

Beverley v. Lincoln Gas Light and Coke Co., 6 A. & E. 329.

Where *A* had done a part, though not all that he was bound to do under the contract, and *X* committed a breach which amounted to a discharge, if that which *A* had done could be represented in a claim for money payment, he was entitled to sue, not only on the special contract, but in *indebitatus assumpsit*, for a *quantum meruit* or the value of so much as he had done. A quantum meruit.

‘If a man agrees to deliver me one hundred quarters of corn, and after I have received ten quarters, *I decline taking any more*, he is at all events entitled to recover against me the value of the ten that I have received.’

Best, C.J., in Mayor v. Pyne, 3 Bing. 288.

But the right to sue in this form on a *quantum meruit* is frequently and emphatically stated to depend on the fact that the contract has been discharged. When it may be sued upon.

‘It is said to be an invariably true proposition, that wherever one of the parties to a special contract not under seal has in an unqualified manner refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing

Hulle v. Heightman, 2 East, 145.

2 Sm. L. C.
21.

so, *immediately* sue on a *quantum meruit*, for anything which he had done under it previously to the rescission.'

It is possible that *A* may have done nothing under the *contract which can be estimated at a money value, [*289] or that the default made by *X* is not such as can be stated in the form of a money claim. Then if the breach amount to a discharge, *A* is exonerated from such performance as may still be due from him, and is entitled to sue at once upon the special contract for such damages as he has sustained.

Rules of
Supreme
Court.

The rules of pleading which have been issued under the Judicature Act do not alter the relations of the parties, though the forms of pleading are shortened and a simple indorsement on the writ of summons may be substituted for the old *indebitatus* counts.

Rights of
party dis-
charged.

Thus where a contract between *A* and *X* is discharged by the default of *X*, *A* may —

Behn v.
Burness,
8 B. & S. 751.

(*a*) Consider himself exonerated from any further performance which may have been due on his part; and successfully defend an action brought for non-performance:¹

Cort v. Am-
bergate Rail-
way Co.,
17 Q. B. 127.

(*β*) Sue at once upon the contract for such damages as he has sustained by its breach, without being obliged to show that such performance has been done or tendered by him.¹

Planché v.
Colburn,
8 Bing. 14.

(*γ*) If he has done all or a portion of that which he promised, so as to have a claim to a money payment for such performance, he may treat such a claim as due upon a new contract arising upon the promise which is understood from the acceptance of an executed consideration.²

¹ Both of these propositions are illustrated in *Darison v. Von Lingen*, 113 U. S. 40, H. & W. 265. The second proposition is exhaustively discussed in *Lake Shore &c. Ry. v. Richards*, 152 Ill. 59.

² See *Dermott v. Jones*, 2 Wall. (U. S.) 1, H. & W. 641; *Hale v. Trout*, 35 Calif. 229, H. & W. 561; *Derby v. Johnson*, 21 Vt. 17, H. & W. 568.

It should also be noted that *A* may elect to keep the contract alive

§ 2. *Forms of discharge by breach.*(2) *Forms of breach.*

We are now in a position to ask, What are the circumstances which confer the rights just mentioned? What is the nature of the breach which amounts to a discharge?

A contract may be broken in any one of three ways: a party to a contract (1) may renounce his liabilities under it, (2) may by his own act make it impossible that he should fulfil them, (3) may totally or partially fail to perform what he has promised.

Modes in which those rights may arise.

Of these forms of breach the first two may take place [290] *while the contract is still wholly executory, i.e. before either party is entitled to demand a performance by the other of his promise. The last can, of course, only take place at or during the time for the performance of the contract.

We will therefore deal first with renunciation and impossibility created by the act of one party *before* and *in the course* of performance, and then with simple failure in performance.

(1) *Discharge by renunciation before performance is due.*

The parties to a contract which is wholly executory have a right to something more than a performance of the contract when the time arrives. They have a right to the maintenance of the contractual relation up to that time, as well as to the performance of the contract when due.

(i) *Renunciation before performance is due*

The renunciation of a contract by one of the parties before the time for performance has come, discharges the other, if he so choose, and entitles him at once to sue for a breach.¹

for the benefit of both parties, thus giving *X* a period for repentance. *Kadish v. Young*, 108 Ill. 170; *Davis v. Bronson*, 2 N. Dak. 300. But he cannot thereby increase the damages. *Clark v. Marsiglia*, 1 Denio (N. Y.), 317; *Dillon v. Anderson*, 43 N. Y. 231.

¹ This is the general rule in the United States. *Windmuller v. Pope*, 107 N. Y. 674, H. & W. 555; *Kurtz v. Frank*, 76 Ind. 594, H. & W. 358; *Remy v. Olds*, 88 Calif. 537; *Kadish v. Young*, 80 Ill. 170. *Contra: Daniels v. Newton*, 114 Mass. 530.

2 E.&B. 678.

Hochster v. Delatour is the leading case upon this subject. *A* engaged *X* upon the 12th of April to enter into his service as courier and to accompany him upon a tour; the employment was to commence on the 1st of June, 1852. On the 11th of May *A* wrote to *X* to inform him that he should not require his services. *X* at once brought an action, although the time for performance had not arrived.

p. 689.

The court held that he was entitled to do so. 'Where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation.'

It would seem needless to imply a promise in order to give the plaintiff a right of action. A contract is a contract from the time it is made, and not from the time that performance of it is due; if this is so, it is needless and clumsy to introduce into every contract an implied promise that, up to a certain period of its existence, it shall not be broken.

Frost v. Knight, L.R. 7 Exch. 114.

is a discharge even if performance be contingent.

*The sense of the rule is very clearly stated by Cockburn, C.J., in a case which goes somewhat further than *Hochster v. Delatour*. In that case the time was fixed for performance, and before it arrived the defendant renounced the contract. In *Frost v. Knight* performance was contingent upon an event which might not happen within the lifetime of the parties. [*291]

L.R. 7 Exch. at p. 114.

A promised to marry *X* upon his father's death, and during his father's lifetime renounced the contract; *X* was held entitled to sue upon the grounds explained above. 'The promisee,' said Cockburn, C.J., 'has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. *In the meantime he has a right to have the contract kept open as a subsisting and effective contract.* Its unimpaired and unimpeached efficacy may be essential to his interests.'

There are two limitations to this rule.¹

The first is that the renunciation must deal with the entire performance to which the contract binds the promisor.

But must go to the whole performance,

In *Johnstone v. Milling*, a landlord covenanted to repair the premises at a certain period of the tenancy. Before this period arrived he repudiated the covenant, and the tenant at once claimed damages for breach of contract. The Court of Appeal doubted whether the rule in *Hochster v. Delatour* was applicable to cases where the renunciation did not go to the whole of the contract.

16 Q. B. D. 460.

‘The contract,’ said Lord Esher, M.R., ‘was the whole lease. The covenant in question is a particular covenant in the lease, not going to the whole consideration. If there were an actual breach of such a covenant at the time fixed for performance, such breach would not, according to the authorities, entitle the tenant to throw up his lease. That being so, I do not hesitate to say, though it is not necessary in this case to decide the point, that an anticipatory breach would not entitle him to do so, and that it does not appear to me that he could elect to rescind part of the contract.’

16 Q. B. D. 468.

The second is that if the promisee will not accept the renunciation, and continues to insist on the performance of the promise, the contract remains in existence for the benefit *and at the risk of both parties, and if any-
[*292] thing occur to discharge it from other causes, the promisor may take advantage of such discharge.

and must be treated as a discharge.

Thus in *Avery v. Bowden*, *A* agreed with *X* by charter-party that his ship should sail to Odessa, and there take a cargo from *X*’s agent, which was to be loaded within a certain number of days. The vessel reached Odessa, and her master demanded a cargo, but *X*’s agent refused to supply one. Although the days within which *A* was

5 E. & B. 714.

¹ (1) The renunciation must be unequivocal and absolute; (2) it must be so understood and acted upon by the other party; (3) it must terminate the entire contract. *Dingley v. Oler*, 117 U. S. 490, 11. & W. 556; *Roebeling’s Sons Co. v. Lock Stitch Fence Co.*, 130 Ill. 660; *Davis v. Bronson*, 2 N. Dak. 300.

entitled to load the cargo had not expired, his agent, the master of the ship, might have treated this refusal as a breach of contract and sailed away. *A* would then have had a right to sue upon the contract. But the master of the ship continued to demand a cargo, and before the running days were out — before therefore a breach by non-performance had occurred — a war broke out between England and Russia, and the performance of the contract became legally impossible. Afterwards *A* sued for breach of the charter-party, but it was held that as there had been no actual failure of performance before the war broke out (for the running days had not then expired), and as the agent had not accepted renunciation as a breach, *X* was entitled to the discharge of the contract which took place upon the declaration of war.

Avery v. Bowden,
5 E. & B.
714.

(2) *Impossibility created by one party before performance is due.*

(ii) **Impossibility created before performance.**

If *A*, before the time for performance arrives, make it impossible that he should perform his promise, the effect is the same as though he had renounced the contract.¹

A promised to assign to *X*, within seven years from the date of promise, all his interest in a lease. Before the end of seven years *A* assigned his whole interest to another person. It was held that *X* need not wait until the end of seven years to bring his action.

Lovelock v. Franklyn,
8 Q. B. 371.

‘The plaintiff has a right to say to the defendant, You have *placed yourself in a situation in which you cannot perform what you have promised; you promised to be ready during [*293] the period of seven years, and during that period I may at any time tender you the money and call for an assignment, and expect that you should keep yourself ready; but if I now were to tender you the money, you would not be ready; this is a breach of the contract.’

[1894] 1 Q.B.
460.

The recent case of *Synge v. Synge* affirms this rule.

¹ *Wolf v. Marsh*, 54 Calif. 228, H. & W. 560; *United States v. Peck*, 102 U. S. 64.

(3) *Renunciation in the course of performance.*

If during the performance of a contract one of the parties by word or act openly and clearly refuses to continue to perform his part, the other party is forthwith exonerated from any further performance of his promise, and is at once entitled to bring action.¹

(iii) Renunciation during performance.

In *Cort v. The Ambergate Railway Company*, Cort contracted with the defendant company to supply them with 3900 tons of railway chairs at a certain price. The chairs were to be delivered in certain quantities at specified dates. After 1787 tons had been delivered, the company desired Cort to deliver no more, as they would not be wanted. He brought an action upon the contract, averring readiness and willingness to perform his part, and that he had been prevented from doing so by the company. He obtained a verdict, but the company moved for a new trial on the ground that Cort should have proved not merely readiness and willingness to deliver, but an actual delivery of the chairs. 17 Q. B. 127.

The Court of Queen's Bench held that where a contract was renounced by one of the parties the other need only show that he was willing to have performed his part.

'When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the

¹ *Hale v. Trout*, 35 Calif. 229, H. & W. 561; *Derby v. Johnson*, 21 Vt. 17, H. & W. 568; *United States v. Behan*, 110 U. S. 338; *Lake Shore &c. Ry. v. Richards*, 152 Ill. 59. If *A* is notified by *B* that the latter renounces the contract, *A* cannot go on to completion if so doing would increase the damages. *Clark v. Marsiglia*, 1 Denio (N. Y.) 317, H. & W. 572; *Davis v. Bronson*, 2 N. Dak. 300; *Hosmer v. Wilson*, 7 Mich. 294; *Tufts v. Lawrence*, 77 Tex. 526.

Cort v.
The Amber-
gate Railway
Co., 17 Q. B.
148.

contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract.'

**(4) Impossibility created by one party in the course of performance.* [*294]

(iv) Im-
possibility
created
during per-
formance.

The rule of law is similar in cases where one party has by his own act made the contract impossible of performance.¹

Planché v.
Colburn,
8 Bing. 14.

Planché was engaged by the Messrs. Colburn to write for £100 a treatise on 'Costume and Ancient Armour' to be published in a serial called 'The Juvenile Library.' He prepared his work at some expense and actually completed a portion of it, but before it was delivered the Messrs. Colburn had abandoned the 'Juvenile Library' on the ill-success of its first numbers. He sued them on the contract and also on a *quantum meruit* for the work and labour expended by him on his treatise. He thus set up two distinct contracts, the original executory contract for the breach of which he claimed damages, and a contract arising from the execution of work upon request, under which he claimed the value of so much as was done before the contract was put an end to by the plaintiff.

It was argued that he could not recover upon the latter of these claims because, his part being unperformed, the original contract was not wholly at an end: but the court held that the abandonment of the publication in question did put an end to the contract and effect a discharge.

'I agree,' said Tindal, C.J., 'that, when a special contract is in existence and open, the plaintiff cannot sue on a *quantum meruit*; part of the question here, therefore, was whether the contract did exist or not. It distinctly appeared that the work was finally abandoned; and the jury found that no new contract had been entered into. Under these circumstances, the plaintiff ought not to lose the fruit of his labour.'

8 Bing. 16.

¹ *Woodberry v. Warner*, 53 Ark. 488, H. & W. 574; *Chicago v. Tilley*, 103 U. S. 146; *Western Union Tel. Co. v. Semmes*, 73 Md. 2.

In a very recent case an Englishman was engaged by the captain of a war-ship owned by the Japanese Government to act as fireman on a voyage from Tyne to Yokohama. In the course of the voyage the Japanese Government declared war with China, and the Englishman was informed that *a performance of the contract [295] would bring him under the penalties of the Foreign Enlistment Act. It was held that he was entitled to leave the ship and sue for the wages agreed upon, since the act of the Japanese Government had made his performance of the contract legally impossible.

O'Neil v. Armstrong, [1895] 2 Q.B. 70.

(5) *Breach by failure of performance.*

When one of two parties to a contract declares that he will not perform his part, or so acts as to make it impossible for him to do so, he thereby releases the other from the contract and its obligations. One of two parties should not be required to tender performance when the other has by act or word indicated that he will not or cannot accept it, or will not or cannot do that in return for which the performance was promised. Nor will the courts hold him any longer bound.

(v) Failure of performance.

Breach may discharge,

But one of the parties may claim that though he has broken his promise wholly or in part the contract is not thereby brought to an end nor the other party discharged from his liabilities. We have then to ascertain whether the promise of the party injured was given conditionally on the performance by the other of that in which he has made default. If it was, he is discharged from his promise: if it was not, he must perform his promise, and bring an action for the damage occasioned by the default of the other.

or only give right of action.

Herein lies the distinction between conditional and independent promises.

A condition may affect the performance of a promise, as a condition *subsequent*, *concurrent*, or *precedent*.

Conditions

subse-
quent,

If two parties agree that the promise of one shall cease to bind him on the happening of a given event the promise is defeasible or liable to be annulled by a condition subsequent. The excepted risks of a charter-party, the condition of a bond, are the best illustration of conditions of this character.

ante, p. 278.

concur-
rent,

If two parties agree that the performance of their respective promises shall be simultaneous, or at least that each shall be ready and willing to perform his promise at the same time, *then the performance of each promise is conditional on this concurrence of readiness and willingness to perform. In a sale of goods where no time is fixed for payment, the buyer must be ready to pay and the seller ready to deliver at one and the same time. [*296]

precedent,

Lastly, when two parties make mutual promises the performance of one or both may depend upon a condition precedent. And here we must distinguish the condition the non-fulfilment of which suspends the operation of a promise, and the condition the non-fulfilment of which discharges the promisor from liability.

(a) sus-
pensory,

A may promise *X* for a certain consideration that he will do some act or make some payment on the happening of a certain event. Until the event happens *A* remains bound by his promise, though not liable to its performance while the condition is unfulfilled.^a

(b) vital.

Or *A* may promise *X* that he will do or pay something in consideration that *X* promises to do or pay something, and the act or payment of *X* may be a condition precedent to the act or payment of *A*. Then, if *X* fails to do what he has promised, not only can *A* sue him for his breach of

^a Illustrations of such suspensory conditions are to be found in promises dependent on the act of a third party — building to be paid for upon architect's certificate: or in promises which await the lapse of a certain time — a debt with a fixed period of credit: or in promises which depend upon some act of the promisee — demand or notice.

contract, but, since his promise was conditional on the performance by *X* of his undertaking, *A* is *discharged* from doing or paying that which he had promised.

So we shall find that the discharge of contract by failure of performance involves questions of three sorts.

(*α*) Two promises may each form the entire consideration for the other — payment and delivery of goods; payment and conveyance of land. Are they independent of one another, so that if *A* fails to convey, *X* must still pay the purchase-money and sue for damage arising from the breach? Or are they *conditional upon one another, [*297] so that if *A* fails to convey, *X* may refuse to pay, and also sue for damages?

Discharge by failure of concurrent condition;

(*β*) Promises may be capable of more or less complete performance. Any failure of performance by *X* would give a right of action to *A*; but would every failure, or what extent of failure, entitle *A* to say that the conditions under which he made his promise are broken, that the consideration for it has wholly failed, and that he will not on his part perform that which he had undertaken to perform?

by virtual failure of consideration;

(*γ*) The contract may be made up of several promises on each side. Which of them, if any, do the parties consider to be vital to the contract? If *A* breaks one of these promises is *X* entitled to say that the performance which he promised was conditional on the fulfilment of the broken promise of *A*? We have to ascertain by the construction of the contract whether this contract was a condition or a warranty.

by breach of condition precedent.

Absolute promises and concurrent conditions.

An absolute promise means a promise made by *A* to *X* in consideration of a promise made by *X* to *A*, and in such a manner that the total failure in the performance of one promise does not discharge the other promisor. He must perform or tender performance of his promise and bring

(*α*) Absolute promises and concurrent conditions.

an action for such loss as he has sustained by the breach of the promise made to him.¹

We may take an illustration from a case of the year 1649:—

Ware v.
Chappell,
Style, 186.

‘Ware brought an action of debt for £500 against Chappell upon an indenture of covenants between them, viz. that Ware should raise 500 soldiers and bring them to such a port, and that Chappell should find shipping and victuals for them to transport them to Galicia; and for not providing the shipping and victuals at the time appointed was the action brought. The defendant pleaded that the plaintiff had not raised the soldiers at that time; and to this plea the plaintiff demurs. Rolle, C.J., held that there was no condition precedent, but that they are distinct and mutual covenants, and that there may be several actions brought for them: and it is not necessary to give notice of the number of men raised, *for the number is known [*298] to be 500; and the time for the shipping to be ready is also known by the covenants; and you have your remedy against him if he raise not the men, as he hath against you for not providing the shipping.’

Style, 186.

By the words ‘several actions’ is meant that the breach of either covenant was a separate cause of action, each being an absolute promise, independent of the other.

Tendency
of modern
decisions.

Modern decisions incline against the construction of promises as independent of one another. Where a time is definitely fixed for the performance of one promise and no date assigned for the performance by the other—if *A* and *X* agree that *A* will buy *X*’s property and pay for it on a certain day and no day is fixed for the conveyance by *X*—then *X* may sue for the money in default of payment on the day named, and need not aver that he has conveyed or offered to convey the lands. But on the whole it is safe to say that, in the absence of clear indications to the

¹ The promises may be mutually independent, or one may be a condition precedent to the performance of the other. *Northrup v. Northrup*, 6 Cow. (N. Y.) 296, H. & W. 576; *Tracy v. Albany Exchange Co.*, 7 N. Y. 472, H. & W. 579; *Hamilton v. Home Ins. Co.*, 137 U. S. 370, H. & W. 353 n.; *McRanen v. Crisler*, 53 Miss. 542, H. & W. 577; *Hill v. Grigsby*, 35 Calif. 656, H. & W. 580; *Brusie v. Peck Bros. & Co.*, 14 U. S. App. 21, H. & W. 582; *Loud v. Pomona Land and Water Co.*, 153 U. S. 564.

contrary, promises, each of which forms the whole consideration for the other, will be held to be concurrent conditions.

Mattock v. Kinglake,
10 A. & E. 50.

These are the antithesis of absolute promises. In the contract for the sale of goods, the rule of common law, now embodied in the Sale of Goods Act, was that, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions.¹

Concurrent conditions.

56 & 57
Vict. c. 71.
s. 28.

Morton agreed to buy a certain quantity of corn from Lamb at a fixed price, the corn to be delivered in one month. It was not delivered and Morton sued for damages, alleging that he had been always ready and willing to *receive* the corn. But the court held that this was not enough to make a cause of action. He should have alleged that he was always ready and willing to *pay* for the corn; he might, for aught that appeared on the pleadings, have discharged the defendant by his non-readiness to pay.

Morton v. Lamb,
7 T. R. 125.

Thus Bayley, J., in *Bloxam v. Sanders*, says:—

4 B. & C. 941.

‘Where goods are sold, and nothing is said as to the time of the delivery or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so [*299] as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price.’

at p. 948.

Divisible promises and virtual failure of consideration.

We now come to cases in which it is alleged by one party to a contract that he is discharged from the performance of his part by the fact that the other party has failed to do his, either wholly or to such an extent as to defeat the objects for which the contract was made.

(b) Divisible promises.

It is plain that a total failure by A to do that which was the entire consideration for the promise of X, and

¹ *Hapgood v. Shaw*, 105 Mass. 276.

which should have been done before the performance of *X*'s promise fell due, will exonerate *X*. But it may be that *A* has done something, though not all that he promised. Or the performance of a contract may extend over a considerable time during which something has to be done by both parties, as in the case of delivery of goods and payment of their price by instalments. In these cases we have to consider whether one party has so far made default that the consideration for which the other gave his promise has wholly failed.

Delivery
and pay-
ment by
instal-
ments.

The best illustrations of divisible promises are to be found in contracts to receive and pay for goods by instalments. Where the instalments are numerous, extending over a considerable period of time, a default either of delivery or payment would not appear to discharge the contract, though it must necessarily give rise to an action for damages.

Simpson v. Crippin,
L. R. 8 Q. B.
14.

Failure to
accept:

Where 6000 to 8000 tons of coal were agreed to be delivered in twelve monthly instalments, the buyer to send waggons to receive them, a default by the buyer who sent waggons for only 158 tons in the first month, was held not to entitle the seller to rescind the contract.

L. R. 9 C. P.
208.

failure to
pay:

In *Freeth v. Burr* there was a failure to pay for one instalment of several deliveries of iron under an erroneous *impression on the part of the buyer that he was entitled to withhold payment as a set-off against [*300] damages for non-delivery of an earlier instalment. In the *Mersey Steel and Iron Co. v. Naylor* there was a similar failure to pay for an instalment under an impression that the appellant company having gone into liquidation there was no one to whom payment could safely be made at the time the instalment fell due. In neither case was the seller held entitled to repudiate the contract by reason of the default.

9 App. Ca
484.

failure to
deliver.

On the other hand, where iron was to be delivered in four monthly instalments of about 150 tons each, a failure

to deliver more than 21 tons in the first month was held to discharge the buyer.

Hoare v. Rennie,
5 H. & N. 19.

Again, where 2000 tons of iron were to be delivered in three monthly instalments, failure to accept any during the first month discharged the seller.

Honck v. Muller,
7 Q. B. D. 92.

The question to be answered in all these cases is one of fact; the answer must depend on the circumstances of each case.^a The question assumes one of two forms—does the failure of performance amount to a renunciation on his part who makes default? or does it go so far to the root of the contract as to entitle the other to say, 'I have lost all that I cared to obtain under this contract; further performance cannot make good the past default'?¹

Questions
to be
solved.

The answer to the question may be provided by the parties themselves. The party who makes the default

Withers v. Reynolds,
2 B. & A.
882.

^a This is substantially the mode in which the legislature has stated the problem in the Sale of Goods Act, § 31. See Chalmers, *Sale of Goods Act*, p. 64.

¹ The English and American cases are fully reviewed in *Norrington v. Wright*, 115 U. S. 188, H. & W. 584, and the conclusion is reached that such contracts are entire; that the subsidiary provisions as to periodical delivery or payment do not render the contract divisible; and that the seller's failure to ship or deliver the first instalment gives the buyer the right to rescind the whole contract. The case of *Hoare v. Rennie* is approved as applicable to such a state of facts, and *Simpson v. Crippin* is disapproved. To the same effect are *King Philip Mills v. Slater*, 12 R. I. 82, which speaks of *Simpson v. Crippin* as "a strained construction" and expressly disapproves it; *Pope v. Porter*, 102 N. Y. 366, which expressly adopts the reasoning and conclusion of *Norrington v. Wright*; *Barrie v. Earle*, 143 Mass. 1; *Rugg v. Moore*, 110 Pa. St. 236. To the contrary is *Gerli v. Poidebard Silk Mfg. Co.* (N. J.) 31 Atl. Rep. 401, where the court holds such contracts severable, and rejects the doctrine that a breach as to the delivery of the first instalment stands on any different footing from a breach as to any subsequent instalment; and see *Myer v. Wheeler*, 65 Iowa, 390. These cases of delivery by instalments are to be distinguished from cases where the contract is divisible because the consideration is apportioned to different items. *Gill v. Johnstown Lumber Co.*, 151 Pa. St. 534; *Wooten v. Walters*, 110 N. C. 251.

Bloomer v.
Bernstein,
L. R. 9 C. P.
588.

may so act as to leave no doubt that he will not or cannot carry out the contract according to its terms.¹

Cutter v.
Powell,
6 T. R. 320.

Or again, the parties may expressly agree that though the promises on both sides are in their nature divisible, nothing shall be paid on one side until after entire performance has taken place on the other. In such case the courts are relieved of the task of interpretation.

Incom-
plete per-
formance.

*But the difficulty may present itself in other forms. In a charter-party containing a promise to load a *complete* cargo the contract is not discharged because the cargo loaded is not complete. The charterer must pay freight for so much as has been delivered. [*301]

Ritchie, v.
Atkinson,
10 East, 308.

‘The delivery of the cargo is in its nature divisible, and therefore I think it is not a condition precedent, but the plaintiff is entitled to recover freight in proportion to the extent of such delivery; leaving the defendant to his remedy in damages for the short delivery.’²

Again, a term in a contract of charter-party that a ship should arrive at a certain place at a certain day, or should use all due diligence to arrive as soon as possible, is one which admits of greater or less failure in performance, and according to the circumstances such failure may or may not discharge the charterer.

Jackson v.
Union
Marine
Insurance
Co., L. R. 10
C. P. 148.

‘Not arriving with due diligence or at a day named is the subject of a cross-action only. But not arriving in time for the voyage contemplated, but at such a time that it is frustrated, is not only a breach of contract but discharges the charterer.’

Sale of
goods:
failure of
considera-
tion,
where
goods
are not
specific.

The contract for the sale of goods furnishes further illustrations, though the matter is somewhat complicated by the distinction between the bargain and sale of specific goods and the executory contract of sale.

In a contract for the sale of goods which are not specific the buyer may protect himself by express conditions

¹ *Gibney v. Curtis*, 61 Md. 192; *Bollman v. Burt*, *Ib.*, 415.

² *Gill v. Johnstown Lumber Co.*, *supra*.

precedent as to quality and fitness of the goods, and with these we are not here concerned. But he is also protected by implied conditions which secure him, if he has been unable to inspect the goods, from being required to accept an article different to that which he bargained for, or practically worthless and unmarketable.¹

Jones v.
Just, L. R.
3 Q. B. 205.

The common law on this subject has now been superseded by the Sale of Goods Act, §§ 13, 14. Where goods are sold by description there is an implied condition that they should correspond to the description;^a ² where they are bought for ^aa particular purpose communicated [*302] by the buyer to the seller there is an implied condition that they are reasonably fit for that purpose;³ where the buyer has no opportunity of examining the goods there is an implied condition that they are of a merchantable quality.⁴

56 & 57 Vict.
c. 71.

These 'implied conditions' ^b go to the root of performance, and their non-fulfilment is a virtual failure of consideration. If *A* agrees to buy beef of *X* the contract is not performed by the supply of mutton, or of an article unfit for human food.

Where specific goods are sold, that is to say, 'goods identified and agreed upon at the time the contract of sale is made,' the property passes to the buyer; he cannot thereafter reject the goods for non-conformity to the

Where
goods are
specific.

^a Chalmers, Sale of Goods Act, pp. 27, 28. Where the sale is by sample and the contract contains a description of the article sold, the description and not the sample is the test of performance. If sample and description differ, the buyer may reject the goods, though they correspond with the sample if they do not correspond with the description.

Nichol v.
Godts,
10 Exch. 191.

^b The Act has happily superseded the use for this purpose of the term 'implied warranty,' a use long ago emphatically condemned by Lord Abinger, though it survived till 1894, to the confusion of all terminology relating to the contract of sale.

Chanter v.
Hopkins,
4 M. & W.
404.

¹ *Pope v. Allis*, 115 U. S. 363, H. & W. 595.

² *Ib.*

³ *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108.

⁴ *Murchie v. Cornell*, 155 Mass. 60.

description given at the time of sale. He is left to obtain such damages as he may have suffered by the seller's default; and this, if the goods should prove wholly valueless, may represent the whole amount of the price paid.¹

56 & 57 Vict.
c. 71. § 53.

The position of the buyer is the same if he has accepted goods which at the time of the sale were not specific, and which he might therefore have rejected if their worthlessness had been apparent. Such would be the case of seed sold as 'new growing seed,' which turned out wholly unproductive when sown. The buyer in such a case was held entitled to recover the whole price.²

Poulton v.
Lattimore, 9
B. & C. 259.

Where the property in the goods has not passed to the buyer he is *discharged* by failure of any of the 'implied conditions,' that is, by virtual failure of consideration. He may reject the goods, and may further bring an action for such damage as he has sustained.³

Where the property in the goods has passed to the buyer *he is not *discharged* though the goods turn out to be worthless; he must keep the goods, but he may [*303] bring an action for money paid under the contract in so

¹ The American cases are not agreed upon this proposition. *Accord: Freyman v. Knecht*, 78 Pa. St. 141, H. & W. 607, and cases there cited. *Contra: Bryant v. Isburgh*, 13 Gray (Mass.), 607, H. & W. 609, and cases there cited.

² *Wolcott v. Mount*, 36 N. J. L. 262, H. & W. 598.

³ *Pope v. Allis, supra*. Whether the buyer *must* reject the goods in order to take advantage of the breach of the warranty or condition, the American cases do not agree. It is held on the one hand that he has an election either to reject the goods and recover damages for breach of the contract to deliver, or to accept the goods and recover damages for the breach of the implied warranty. *Pope v. Allis, supra; English v. Spokane Comm. Co.*, 57 Fed. Rep. 451; *Wolcott v. Mount, supra*. On the other hand, it is held that the implied condition or warranty will not survive the acceptance of the goods. *Haase v. Nonnemacher*, 21 Minn. 486; *McClure v. Jefferson* (Wis.), 54 N. W. Rep. 777. In New York an implied condition or warranty arising from sale by description will not survive acceptance. *Coplay Iron Co. v. Pope*, 108 N. Y. 232, H. & W. 597; though one arising from sale by sample will survive. *Zabriskie v. Central Vt. R.*, 131 N. Y. 72.

far as it is in excess of the value of the goods, and for any further damage occasioned by the breach of warranty.¹

Street v. Blay,
2 B. & A.
456.

Conditions and warranties, or vital and subsidiary promises.

Under the previous heading I have shown that where promises admit of more or less complete performance, and default is made on one side, the courts must determine whether or no that default amounts to a renunciation of the contract by the party making it, or so frustrates the objects of the contract as to discharge the party injured from his liabilities.

(c) Con-
ditions and
warrant-
ties.

But contracts are often made up of various statements and promises on both sides, differing in character and in importance; the parties may regard some of these as vital, others as subsidiary, or collateral to the main purpose of the contract. Where one of these is broken the court must discover, from the tenour of the contract or the expressed intention of the parties, whether the broken term was vital or not.

If the parties regarded the term as essential, it is a condition: its failure discharges the contract. If they did not regard it as essential, it is a warranty: its failure can only give rise to an action for such damages as have been sustained by the failure of that particular term.

A condition precedent, in this sense, may be defined as a statement or promise, the untruth or failure of which discharges the contract.

Condition
precedent.

A warranty is a more or less unqualified promise of indemnity against a failure in the performance of a term in the contract.^a

Warranty.

^a This view of the distinction between condition and warranty is substantially adopted in the Sale of Goods Act, 1893, so far as that particular species of contract is concerned. See §§ 10-15, and Chalmers, Sale of Goods Act, Appendix ii.

¹ *Ante*, p. 368, note 1; *Underwood v. Wolfe*, 131 Ill. 425; *Wiley v. Athol*, 150 Mass. 426.

Vital statement. *Warranty and condition alike are parts, and only parts, of a contract consisting in various terms. [*304]

8 B. & S. 751. Bearing in mind that a condition may assume the form either of a *statement* or of a promise, we find a good illustration of such a vital term in *Behn v. Burness*, where a ship was stated in the contract of charter-party to be 'now in the port of Amsterdam,' and the fact that the ship was not in that port at the date of the contract discharged the charterer.¹

2 M. & G. 257. A *promise* vital to the contract is illustrated by the case of *Glaholm v. Hays*. A vessel was chartered to go from England to Trieste and there load a cargo, and the charter-party contained this clause: 'the vessel to sail from England on or before the 4th day of February next.' The vessel did not sail for some days after the 4th of February, and on its arrival at Trieste the charterer refused to load a cargo and repudiated the contract. The judgment of the court was thus expressed:—

Glaholm v. Hays, 2 M. & G. 268. 'Whether a particular clause in a charter-party shall be held to be a condition upon the non-performance of which by the one party the other is at liberty to abandon the contract and consider it at an end, or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, must depend upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself, and from the subject-matter to which it relates. . . . Upon the whole, we think the intention of the parties to this contract sufficiently appears to have been, to insure the ship's sailing at latest by the 4th of February, and that the only mode of effecting this is by holding the clause in question to have been a condition precedent.'²

Warranty. The nature of a warranty as compared with a condition precedent is illustrated by the case of *Bettini v. Gye*. Bettini entered into a contract with Gye, director of the Italian Opera in London, for the exclusive use of his services as a singer in operas and concerts for a consider-

1 Q. B. D. 168. Condition and warranty.

¹ *Davidson v. Von Lingen*, 113 U. S. 40, H. & W. 265.

² *Louber v. Bangs*, 2 Wall. (U. S.) 728, where a promise that a vessel shall proceed "with all possible despatch" was held vital.

able time and on a number of terms. Among these terms was an undertaking that he would be in London six days at least before the commencement of his engagement, for rehearsals. He *only arrived two days before his [*305] engagement commenced, and Gye thereupon threw up the contract.

Blackburn, J., in delivering the judgment of the court described the process by which the true meaning of such terms in contracts is ascertained.

First he asks, does the contract give any indication of the intention of the parties?

‘Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one: or they may think that the performance of some matter apparently of essential importance and *prima facie* a condition precedent is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.’

Bettini v.
Gye,
1 Q. B. D.
187.

He finds in the contract no such expression of the intention of the parties; this being so, the interpretation of the disputed term remained for the court. It was held that the term as to rehearsals was not vital to the contract, and was not a condition precedent: its breach did not operate as a discharge and could be compensated by damages.¹

I have called a warranty ‘a more or less unqualified Warranty. promise.’ The phrase can be illustrated by the contract between a railway company and its passengers. It is sometimes said that a railway company as a common carrier warrants the safety of a passenger’s luggage, but does not warrant his punctual arrival at his destination in accordance with its time tables. In the true use of the term *warranty*, as distinct from *condition*, the company warrants the one just as much as it warrants the other. In each

¹ See *Mill-Dam Foundry v. Hovey*, 21 Pick. 417, 436. For distinction between condition and warranty, see *ante*, p. 183, notes.

Richards v.
L. B. & S. C.
Railway Co.,
7 C. B. 839.
Le Blanche
v. L. &
N. W. Rail-
way Co.,
1 C. P. D.
286.

case it makes a promise subsidiary to the entire contract, but in the case of the luggage its promise is qualified only by the excepted risks incident to the contract of a common carrier; in the case of the time table its promise amounts to no more than an undertaking to use reasonable diligence to ensure punctuality. The answer to the question whether a promise is or is not a warranty does not depend on the greater or less degree *of diligence which is exacted or undertaken in the performance of it, but [*306] on the mode in which the breach of it affects the liabilities of the other party.

It is right to observe that the word warranty is used in a great variety of senses,^a but I would submit that its

^a For the purposes of the contract for the sale of goods the sense in which I have used the word *warranty* is adopted in the Sale of Goods Act, § 62, but it may be worth setting out some of the uses of the term to be found in the reports:—

(1) It is used as equivalent to a condition precedent in the sense of a descriptive statement vital to the contract. *Behn v. Burness*, 3 B. & S. 751.

(2) It is used as equivalent to a condition precedent in the sense of a promise vital to the contract. *Behn v. Burness*.

(3) It is used as meaning a condition the breach of which has been acquiesced in, and which therefore forms a cause of action but does not create a discharge. *Behn v. Burness*.

(4) In relation to the sale of goods it is used as an independent subsidiary promise, 'collateral to the main object of the contract the breach of which gives rise to a claim for damages, but not to a right to reject the goods.' *Chanter v. Hopkins*, 4 M. & W. 404.

(5) In relation to the sale of goods, warranty is used for an express promise that an article shall answer a particular standard of quality; and this promise is a condition until the sale is executed, a warranty after it is executed.

(6) *Implied warranty* is a term used very often in such a sense as to amount to a repetition by implication of the express undertaking of one of the contracting parties. Thus there was said to be an implied warranty in an executory contract of sale that goods shall answer to their specific description and be of a merchantable quality. This is now an implied condition. Sale of Goods Act, §§ 13, 14.

Implied warranty of title has been a vexed question, and there are conflicting cases. (*Eicholz v. Bannister*, 17 C. B., N. S. 708; *Baguely v. Hawley*, L. R. 2 C. P. 625.) In the contract of sale of goods, the undertaking of title is now an 'implied condition.'

Implied warranty of authority is the undertaking which a professed agent is supposed to give to the party with whom he contracts, that he has the authority which he professes to have. Implied warranty of possibility is a supposed undertaking that a promise is not impossible of performance.

Street v.
Blay,
2 B. & A.
456.

Jones v.
Just, L. R.
8 Q. B. 197.

56 & 57 Viet.
c. 71. § 12.

Collen v.
Wright,
7 E. & B. 301.
8 E. & B. 647.
Clifford v.
Watts, L. R.
5 C. P. 517.

primary meaning is that which I have assigned to it. 'A warranty is an expressly implied statement of something which the party undertakes shall be a term in the contract and though part of the contract collateral to the express object of it.'

Lord Abinger, C.B.,
in *Charter v Hopkins*,
4 M. & W.
404.

One cause of the confusion which overhangs the use of the *term warranty arises from the rule that a condition may change its character in the course of the performance of a contract; and that a breach which would have effected a discharge if treated as such at once by the promisee, ceases to be such if he goes on with the contract and takes a benefit under it. It is then called a warranty.^a

A breach
of condition
turns
it into a
warranty.

Graves v.
Legg,
9 Exch. 717.

This aspect of a condition precedent is pointed out by Williams, J., in *Behn v. Burness*, where he speaks of the right of the promisee, in the case of a broken condition, to repudiate the contract, 'provided it has not already been partially executed in his favour;' and adds that if after breach the promisee continues to accept performance, the condition loses its effect as such, and becomes a warranty in the sense that it can only be used as a means of recovering damages.

3 B. & S.
756.

The case of *Pust v. Dowie* illustrates this rule. A vessel was chartered for a voyage to Sydney; the charterer promised to pay £1550 in full for this use of the vessel on condition of her taking a cargo of not less than 1000 tons weight and measurement. He had the use of the vessel as agreed upon; but she was not capable of holding so large a cargo as had been made a condition of the contract. He refused to pay the sum agreed upon, pleading the breach of this condition. The term in the contract as to weight and bulk of cargo was held to have amounted, in its inception, to a condition. Blackburn, J., said:—

32 L.J.Q.B.
179.

^a See 56 & 57 Vict. c. 71. §§ 11, 53, and Chalmers, *Sale of Goods Act*, pp. 23, 24, 99, 100.

*'If when the matter was still executory, the charterer had refused to put any goods on board, on the ground that the vessel was not of the capacity for which he had stipulated, I will not say that he might not have been justified in repudiating the contract altogether; and in that case the condition would have been a condition precedent in the full sense.'*⁷

ib. 181.

But he adds:—

*'Is not this a case in which a substantial part of the consideration has been received? And to say that the failure of a single *ton (which would be enough to support the plea) is to pre-vent the defendant from being compelled to pay anything at all, would be deciding contrary to the exception put in the case of Behn v. Burness.'*¹

§ 3. Remedies for breach of contract.

(3) Remedies for breach.

Having endeavoured to ascertain the rules which govern the discharge of contract by breach, it remains to consider the remedies which are open to the person injured by the breach.

If the contract be discharged by the breach, the person injured acquires or may acquire, as we have seen, three distinct rights: (1) a right to be exonerated from further performance; (2) a right, if he has done anything under the contract, to sue upon a *quantum meruit*, a cause of action distinct from that arising out of the original contract, and based upon a new contract originating in the

¹ Where the plaintiff has in good faith attempted to perform the conditions of his contract he is generally permitted to recover for benefits conferred less the damages suffered from non-performance of the whole. *Gove v. Island City Co.*, 19 Ore. 363; *Dermott v. Jones*, 2 Wall. (U. S.) 1, H. & W. 641. *Contra: Catlin v. Tobias*, 26 N. Y. 217. See as to substantial performance, *ante*, p. 348, note.

Some jurisdictions allow a recovery where the non-performance is wilful. *Britton v. Turner*, 6 N. H. 481; *Duncan v. Baker*, 21 Kans. 99; *Parcell v. McComber*, 11 Neb. 209; *Fuller v. Rice*, 52 Mich. 435. But this is contrary to the weight of authority. *Stark v. Parker*, 2 Pick. (Mass.) 267; *Peterson v. Mayer*, 46 Minn. 468; *Lawrence v. Miller*, 86 N. Y. 131; *Thrift v. Payne*, 71 Ill. 408.

conduct of the parties; (3) a right of action upon the contract, or term of the contract, broken.

But we have done with breach of contract as effecting a discharge. We may now consider generally what are the remedies open to a person who is injured by the breach of a contract made with him, whether or no that breach discharges him from further performance. The remedies are of two kinds: he may seek to obtain *damages* for the loss he has sustained; or he may seek to obtain a *decree for specific performance*, or an *injunction*, to enforce the promised acts or forbearances of the other party.

Damages.

Specific performance.

But there is this difference between the two remedies: every breach of contract entitles the injured party to *damages*, though they be but nominal; but it is only in the case of certain contracts and under certain circumstances that *specific performance* or an *injunction* can be obtained.

The topic is one which barely comes within the scope of this work: but I will endeavour to state briefly some elementary rules which govern the two remedies in question.

[*309]

**Damages.*

(i) *Damages.*

When a contract is broken and action is brought upon it, — the damages being unliquidated, that is to say unascertained in the terms of the contract, — how are we to arrive at the amount which the plaintiff, if successful, is entitled to recover?

(1) 'The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.'

Parke, B.,
in *Robinson v. Harman*,
1 Exch. 855.
Damages
should
represent
loss sustained;

Where no loss accrues from the breach of contract, the plaintiff is nevertheless entitled to a verdict, but for nominal damages only, and 'nominal damages, in fact, mean a sum of money that may be spoken of, but that has no exist-

Maule, J.,
in *Beaumont*
v. Greathead,
2 C. B. 499.

ence in point of quantity.' And so in an action for the non-payment of a debt, where there is no promise to pay interest upon the debt, nothing more than the sum due can be recovered; for the possible loss arising to the creditor from being kept out of his money is not allowed to enter into the consideration of the jury in assessing damages, unless it was expressly stated at the time of the loan to be within the contemplation of the parties. But by 3 & 4 Will. IV. c. 42. §§ 28, 29 a jury may allow interest at the current rate by way of damages in all cases where a debt or sum certain was payable by virtue of a written instrument, or if not so payable was demanded in writing with notice that interest would be claimed from the date of the demand.

so far as it
was in
contem-
plation
of the
parties.

(2) The rule laid down by Parke, B., in *Robinson v. Harman* must be taken subject to considerable limitations in practice.

Hadley v.
Baxendale,
9 Exch. 354.

Grebert
Borgnis v.
Nugent,
15 Q. B. D.
85.

The breach of a contract may result in losses which neither party contemplated, or could contemplate at the time that the contract was entered into. In such a case the damages to which the plaintiff is entitled are no more than might have been supposed by the parties to be the natural *result of a breach of the contract. In de-termining the measure of damages — as in determin- [*310] ing the meaning of a contract — where the parties have left the matter doubtful we ask what would have been in the contemplation of a reasonable man when the contract was made.

Excep-
tional loss
should be
matter of
special
terms.

Blackburn,
J., in
Horne v.
Midland
Railway Co.,
L. R. 8 C. P.
131.

A special loss which would not naturally and obviously flow from the breach, must, if it is to be recovered, be matter of express terms in the making of the contract.

In *Horne v. Midland Railway Company*, the plaintiff being under contract to deliver shoes in London at an unusually high price by a particular day, delivered them to the defendants to be carried, with notice of the contract

only as to the date of delivery. The shoes were delayed in carriage, and were consequently rejected by the intending purchasers. The plaintiff sought to recover, besides the ordinary loss for delay, the difference between the price at which the shoes were actually sold and that at which they would have been sold if they had been punctually carried. It was held that this damage was not recoverable, unless it could be proved that the company undertook to be liable for the exceptional loss which the plaintiff might suffer from an unpunctual delivery.¹

(3) Damages for breach of contract are by way of compensation and not of punishment. Hence a plaintiff can never recover more than such pecuniary loss as he has sustained, subject to the above rules.

Damages for breach of contract not vindictive.

To this rule the breach of promise of marriage is an exception; in such cases the feelings of the person injured are taken into account, in addition to such pecuniary loss as can be shown to have arisen.

Finlay v. Chirney, 20 Q. B. D. at p. 498.

(4) The parties to a contract not unfrequently assess the damages at which they rate a breach of the contract by one or both of them, and introduce their assessment into the terms of the contract. Under these circumstances arises the distinction between penalty and liquidated damages, which we have already dealt with in considering [*311] the construction of contracts.

Assessment by parties.

See p. 270.

(5) Difficulty in assessing damages does not disentitle a plaintiff from having an attempt made to assess them.²

In *Robinson v. Harman*, 1 Ex. 855.

¹ *Wolcott v. Mount*, 36 N. J. L. 262, H. & W. 598; *Rochester Lantern Co. v. Stiles & Co.*, 135 N. Y. 209, H. & W. 447; *Allison v. Chandler*, 11 Mich. 542; *Fox v. Boston & Co.*, 148 Mass. 220.

² *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205; *Beeman v. Banta*, 118 N. Y. 538; *Swain v. Schieffelin*, 134 N. Y. 471; *United States v. Behan*, 110 U. S. 338; *Howard v. Manufacturing Co.*, 139 U. S. 199.

Difficulty
of assess-
ment must
be met by
jury.

A manufacturer was in the habit of sending specimens of his goods for exhibition to agricultural shows, and he made a profit by the practice. He entrusted some such goods to a railway company, who promised the plaintiff, under circumstances which should have brought his object to their notice, to deliver the goods at a certain town on a fixed day. The goods were not delivered at the time fixed, and consequently were late for a show at which they would have been exhibited. It was held that though the ascertainment of damages was difficult and speculative, the difficulty was no reason for not giving any damages at all.

Simpson v.
L. & N. W.
Railway Co.,
1 Q. B. D.,
274.

And further, the plaintiff is entitled to recover for prospective loss arising from a refusal by the defendant to perform a contract by which the plaintiff would have profited. Thus where a contract was made for the supply of coal by the defendants to the plaintiff by monthly instalments, and breach occurred and action was brought before the last instalment fell due, it was held that the damages must be calculated to be the difference between the contract price and the market price at the date when each instalment should have been delivered, and that the loss arising from the non-delivery of the last instalment must be calculated upon that basis, although the time for its delivery had not arrived.

Roper v.
Johnson,
L. R. 8 C. P.
107.

Specific performance and injunction.

(ii) **Specific performance and injunction.**

Under certain circumstances a promise to do a thing may be enforced by a decree for specific performance, and an express or implied promise to forbear by an injunction.

(a) **Specific performance.**

These remedies were once exclusively administered by

As to the duty of the injured party to use reasonable care not to increase his own damages, see *Mathér v. Butler County*, 28 Iowa, 253, H. & W. 612; *Parsons v. Sutton*, 66 N. Y. 92; *Clark v. Marsiglia*, 1 Denio (N. Y.), 317, H. & W. 572.

the chancery. They supplemented the remedy in damages offered by the common law, and were granted at the discretion of the chancellor acting as the administrator of the king's grace. A matter of grace.

[*312] *It will be enough here to illustrate the two main characteristics of these remedies — that they are supplementary — that they are discretionary. When refused.

(1) Where damages are an adequate remedy, specific performance will not be granted.

‘The remedy by specific performance was invented, and has been cautiously applied, in order to meet cases where the ordinary remedy by an action for damages is not an adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary and confined within well-known rules.’ Ryan v. Mutual Tontine Association, [1893] 1 Ch. at p. 126.

Damages may be a very insufficient remedy for the breach of a contract to convey a plot of land: the choice of the intending purchaser may have been determined by considerations of profit, health, convenience, or neighbourhood: but damages can usually be adjusted so as to compensate for a failure to supply goods. In the latter case, therefore, the chancery would decree the specific performance only in the case of chattels possessing a special beauty, rarity, or interest.¹

It is only by statute, and in the case of a breach of contract to deliver *specific* goods, that the court may direct the contract to be performed specifically without allowing the seller an option to retain the goods and pay damages. 56 & 57 Vict. c. 71. § 52.

(2) Where the court cannot supervise the execution of the contract specific performance will not be granted.

If the court endeavoured to enforce a contract of

¹ *Adams v. Messinger*, 147 Mass. 185, H. & W. 613; *Johnson v. Brooks*, 93 N. Y. 337; *Rotholz v. Schwartz*, 46 N. J. Eq. 477; *Gottschalk v. Stein*, 69 Md. 51; *Singer v. Carpenter*, 125 Ill. 117.

Wolver-
hampton
Railway Co.
v. L. & N.
W. Railway
Co., L. R. 16
Eq. 439.

employment, or a contract for the supply of goods to be delivered by instalments, it is plain 'that a series of orders and a general superintendence would be required which could not conveniently be undertaken by any court of justice,' and 'the court acts only where it can perform the very thing in the terms specifically agreed upon.'

(3) Unless the contract is 'certain, fair, and just,' specific performance will not be granted.

Webster v.
Cecil, 80
Beav. 62.

It is here that the discretionary character of the remedy is most strongly marked. It does not follow that specific *performance will be granted although there may be a contract actionable at common law, and although [313] damages may be no adequate compensation. The court will consider the general fairness of the transaction and refuse the remedy if there is any suspicion of sharp practice on the part of the suitor.

Kekewich v.
Manning,
1 D. M. & G.
at p. 188.

In re Lucan,
45 Ch. D.
470.

Flight v.
Bolland, 4
Russ. 298.

Akin to this principle is the requirement that there must be *mutuality* between the parties. This means that at the time of making the contract there must have been consideration on both sides or promises mutually enforceable by the parties. Hence specific performance of a gratuitous promise under seal will not be granted; nor can an infant enforce a contract by this remedy. His promise is not enforceable against himself, though he might bring action upon it in the Queen's Bench Division of the High Court, and 'it is a general principle of courts of equity to interfere only where the remedy is mutual.'¹

(b) **Injunction,**

ante, p. 251.

An injunction may be used as a means of enforcing a simple covenant or promise to forbear. Such would be the case of building covenants described earlier, restrain-

¹ But if a donee of lands goes into possession and makes valuable improvements in reliance upon the promise, equity will specifically enforce it. *Freeman v. Freeman*, 43 N. Y. 34; *Irwin v. Dyke*, 114 Ill. 302; *Manly v. Howlett*, 55 Calif. 94; *Smith v. Smith*, 125 N. Y. 224.

ing the use of property otherwise than in certain specified manner.

Or it may be the only means of enforcing the specific performance of a covenant where damages would be an inadequate remedy, while to enforce performance of the covenant would involve a general superintendence such as the court could not undertake. Thus a hotel keeper who obtained a lease of premises with a covenant that he would buy beer exclusively of the lessor and his assigns was compelled to carry out his covenant by an injunction restraining him from buying beer elsewhere.

when
granted,

Clegg v.
Hands, 44
Ch. D. 503.

Lumley v. Wagner is an extreme illustration of the principle. Miss Wagner agreed to sing at Lumley's theatre, and during a certain period to sing nowhere else. Afterwards she made a contract with another person to sing at another theatre, and refused to perform her contract with Lumley. The court refused to enforce Miss [*314] Wagner's positive engagement to sing at Lumley's theatre, but compelled performance of her promise not to sing elsewhere by an injunction.

1 D. M. & G.
604.

Here there was an express negative promise which the court could enforce, and it has been argued that an express *positive* promise gives rise to a negative undertaking not to do anything which should interfere with the performance of this promise. But the court is apparently disinclined to carry any further the principle of *Lumley v. Wagner*.

or refused.

Fry, Specific
Perform-
ance, §§ 860,
862 (ed. 8).

The case has been said to be 'an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend.'¹

Where a person employed by a company as manager agreed to 'give the whole of his time to the company's business,' and afterwards gave some of his time to another,

¹ *Daly v. Smith*, 49 How. Pr. (N. Y.) 150. Cf. *Cort v. Lassard*, 18 Ore. 221, H. & W. 619.

and a rival, company, an injunction to restrain him from so doing was refused.

‘I think,’ said Lindley, L. J., ‘the court will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone: and whether it is attempted to enforce these contracts directly by a decree for specific performance or indirectly by an injunction, appears to me to be immaterial. It is on the ground that mischief will be done at all events to one of the parties, that the court declines in cases of this kind to grant an injunction, and leaves the party aggrieved to such remedy as he may have apart from the extraordinary remedy of injunction.’

Whitwood
Chemical
Co. v. Hard-
man, [1891]
2 Ch. (C. A.)
428.

And this principle will be acted upon although a stipulation, affirmative in substance, is couched in a negative form. An employer stipulated with his manager that he would not require him to leave the employment except under certain circumstances. It was held that such an undertaking could not be enforced by an injunction to restrain the employer from dismissing the manager.

Davis v.
Foreman,
[1894] 3 Ch.
654.

Effect of
Judicature
Acts.

36 & 37 Vict.
c. 66, § 34.
sub-§ 3.

Though an equitable claim or counter-claim may be asserted in any Division of the High Court of Justice, there is assigned to the Chancery Division, as a special department of its *business, suits for ‘specific performance of contracts between vendors and purchasers of real [*315] estate, including contracts for leases.’ A suit for specific performance, if brought in any other than the Chancery Division, would be transferred to that Division by an order of the Court.

§ 4. *Discharge of right of action arising from breach of contract.*

(4) Dis-
charge of
right of
action.

The right of action arising from a breach of contract can only be discharged in one of three ways:—

- (i) By the consent of the parties.
- (ii) By the judgment of a court of competent jurisdiction.
- (iii) By lapse of time.

(i) *Discharge by consent of the parties.*

This may take place either by release or by accord and satisfaction; and the distinction between these two modes of discharge brings us back to the elementary rule of contract, that a promise made without consideration must, in order to be binding, be made under seal.

A release is a waiver, by the person entitled, of a right of action accruing to him from a breach of a promise made to him. In order that such a waiver should bind the person making it, it is necessary that it should be made under seal; otherwise it would be nothing more than a promise, given without consideration, to forbear from the exercise of a right.¹

To this rule bills of exchange and promissory notes form an exception. We have already seen that these instruments admit of a parol waiver before they fall due. One who has a right of action arising upon a bill or note can discharge it by an unconditional gratuitous renunciation, in writing, or by the delivery of the bill to the acceptor.²

Accord and satisfaction is an agreement, not necessarily under seal, the effect of which is to discharge the right of action possessed by one of the parties to the agreement. In order to have this effect there must not only be consideration *for the promise of the party entitled to sue, but the consideration must be executed in his favour. Otherwise the agreement is an *accord* without a *satisfaction*. The promisor must have obtained what he bargained for in lieu of his right of action, and must have

(i) Dis-
charge by
consent of
parties.

(a) By re-
lease,

ante, p. 275.

45 & 46 Vict.
c. 61. § 62.

(b) By ac-
cord and
satisfac-
tion.

Bayley v.
Homan,
8 Bing. N. C.
at p. 920.

¹ *Kidder v. Kidder*, 33 Pa. St. 268, H. & W. 625; *Collyer v. Moulton*, 9 R. I. 90, H. & W. 522; *Hale v. Spaulding*, 145 Mass. 482, H. & W. 487; *Pierce v. Parker*, 4 Met. (Mass.) 80.

² Not so in the United States unless the bill or note be surrendered, in which case the transaction operates by way of executed gift. *Slade v. Mutrie*, 156 Mass. 19; ante, p. 335, note.

McManus v.
Bark,
L. R. 5 Ex.
65.

obtained something more than a new arrangement as to the payment or discharge of the existing liability.¹

Goddard v.
O'Brien,
9 Q. B. D. 40.
Bidder v.
Bridges,
37 Ch. D.
(C. A.) 406.

The *satisfaction* may consist in the acquisition of a new right against the debtor, as the receipt from him of a negotiable instrument in lieu of payment;² or of new rights against the debtor and third parties, as in the case of a composition with creditors;³ or of something different in kind to that which the debtor was bound by the original contract to perform;⁴ but it must have been taken by the creditor as *satisfaction* for his claim in order to operate as a valid discharge.

and see 8m.
L. C. 1. 377
(9th ed.).

(ii) *Discharge by the judgment of a court of competent jurisdiction.*

(ii) Dis-
charge by
judgment.

The judgment of a court of competent jurisdiction in the plaintiff's favour discharges the right of action arising from breach of contract. The right is thereby *merged* in the more solemn form of obligation which we have dealt with elsewhere as one of the so-called contracts of record.⁵

See ch. v.
§ 1.

The result of legal proceedings taken upon a broken contract may thus be summarised:—

Effect of
bringing
action;

The bringing of an action has not of itself any effect in discharging the right to bring the action. Another action may be brought for the same cause in another court; and though proceedings in such an action would be stayed, if

¹ The accord must be executed or satisfied to be binding. *Kromer v. Heim*, 75 N. Y. 574, H. & W. 627; *Hosler v. Hursh*, 151 Pa. St. 415. Cf. *Babcock v. Hawkins*, 23 Vt. 561. When executed the accord is binding. *Alden v. Thurber*, 149 Mass. 271, H. & W. 630; *McCreery v. Day*, 119 N. Y. 1, H. & W. 524.

² *Babcock v. Hawkins*, *supra*. Cf. *Hosler v. Hursh*, *supra*.

³ *Ante*, p. 108, note.

⁴ *McCreery v. Day*, *supra*.

⁵ *Miller v. Covert*, 1 Wend. (N. Y.) 487, H. & W. 631. But it must be the same right of action. *Vanuxem v. Burr*, 151 Mass. 386, H. & W. 632. Judgment of foreign court does not bar action. *Ante*, p. 58, note 1.

they were merely vexatious, upon application to the summary jurisdiction of the courts, yet if action for the same cause be brought in an English and a foreign court, the fact that the defendant is being sued in the latter would not in any way help or affect his position in the former.¹

Judicature
Acts, order
25. r. 4.

When judgment is given in an action, whether by consent, or by decision *of the court, such a judgment dis-
[*317] charges the obligation by *estoppel*. The plaintiff cannot bring another action for the same cause so long as the judgment stands.² The judgment may be reversed by the court, in which case it may be entered in his favour, or else the parties may be remitted to their original positions by a rule being obtained for a new trial of the case.

of judg-
ment,

Ex parte
Bank of
England,
[1895] 1 Ch.
81.
by way of
estoppel,

But such estoppel can only result from an adverse judgment if it has proceeded upon the merits of the case. If a man fail because he has sued in a wrong character, as executor instead of administrator; or at a wrong time, as where action is brought before a condition of the contract is fulfilled, such as the expiration of a period of credit in the sale of goods, a judgment proceeding on these grounds will not prevent him from succeeding in a subsequent action.³

Palmer v.
Temple,
9 A. & E.
321.

If the plaintiff get judgment in his favour, the right of action is discharged and a new obligation arises, a form of the so-called contract of record. It remains to say that the obligation arising from judgment may be discharged if the judgment debt is paid, or satisfaction obtained by the creditor from the property of his debtor by the process of *execution*.

by way of
merger ;

p. 49.

4 & 5 Anne,
c. 16. § 12.

of execu-
tion.

¹ Pendency of action in one State does not bar an action in another State or in the Federal courts. *Pierce v. Feagans*, 39 Fed. Rep. 587; *Stanton v. Embrey*, 93 U. S. 548; *McJilton v. Love*, 13 Ill. 486.

² *Nashville &c. Ry. v. United States*, 113 U. S. 261; *Gould v. Sternberg*, 128 Ill. 510.

³ *Kittredge v. Holt*, 58 N. H. 191; *Wood v. Faut*, 55 Mich. 185.

(iii) Dis-
charge by
lapse of
time.

Per Lord
Selborne,
Llanelly
Ky. Co. v.
L. & N. W.
Ky. Co.,
L. R. 7 H. L.
567.

(iii) *Lapse of time.*

At common law lapse of time does not affect contractual rights. Such rights are of a permanent and indestructible character, unless either from the nature of the contract, or from its terms, it be limited in point of duration.

But though the rights possess this permanent character, the remedies arising from their violation are, by various statutory provisions, withdrawn after a certain lapse of time. The remedies are barred, though the rights are not extinguished.¹

Simple
contract.

It was enacted by 21 Jac. I. c. 16. § 3 that

‘All actions of account, and upon the case . . . all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent . . . shall be commenced and *sued within . . . six years next after the cause of such ac- [*318] tion or suit and not after.’

p. 45.

It will be noted that ‘action upon the case’ includes actions of assumpsit, as was explained in an earlier chapter.

Special-
ties.

The statute 3 & 4 Will. IV. c. 42. § 3 limits the bringing of actions upon any contract under seal to a period of twenty years from the cause of action arising.

Disabili-
ties sus-
pending
operation
of stat-
utes.

These statutes begin to take effect so soon as the cause of action arises, but there may be circumstances which suspend their operation. The statute of James provided that infancy, coverture, insanity, imprisonment, or absence beyond seas should, if the plaintiff was under any such disabilities when the cause of action arose, suspend the operation of the statute until the removal of the disability.

21 Jac. I.
c. 16. § 7.

¹ The English and American Statutes of Limitation will be found in Wood, Limitation of Actions, Appendix, pp. 629-864. In Wisconsin it is held that the statute extinguishes the right. *Pierce v. Seymour*, 52 Wis. 272. But the general holding is that the remedy is barred and that when the bar is removed either by act of the debtor or by law the right revives. *Campbell v. Holt*, 115 U. S. 620.

The statute of William IV applied the same rule, except in case of imprisonment, to actions on specialties. 3 & 4 Will.
IV. c. 42. § 4.

The Mercantile Law Amendment Act takes away the privilege of a plaintiff who is imprisoned or beyond seas in actions on simple contract or specialty. 19 & 20 Vict.
c. 97. § 10.

Where the defendant is beyond seas at the time the right of action accrues, the operation of the statute is suspended until he returns. 3 & 4 Will.
IV. c. 42.
§ 4.
4 Anne,
c. 16. § 19.

But where one of two or more defendants is beyond seas, action brought against those who are accessible will not affect the rights of the plaintiff against such as may be beyond seas. 19 & 20 Vict.
c. 97. § 11.

In the case of *Musurus Bey v. Gadban* the defendant counter-claimed a debt due from the plaintiff as executor of Musurus Pacha, who had incurred the debt to Gadban twenty years before while he was Turkish ambassador in London. It was held that no right of action could accrue against Musurus Pacha while he was ambassador, nor within a reasonable time during which he remained in England after his recall; that thenceforward he was beyond seas, until his death in 1890, and that therefore the statute had not begun to take effect at that date, and the counter-claim was sustainable. [1894] 2 Q. B.
(C. A.) 352.

[*319] *A disability arising after the period of limitation has begun to run will not affect the operation of the statute: nor will ignorance that a right of action existed. But where that ignorance is produced by the fraud of the defendant, and no reasonable diligence would have enabled the plaintiff to discover that he had a cause of action, the statutory period commences with the discovery of the fraud. This is an equitable rule generalized in its application by s. 24. sub-s. 1 of the Judicature Act (1873).¹

Blair v.
Bromley,
5 Hare, 559.
Gibbs v.
Guild,
9 Q. B. D. 66.

Statutes of Limitation may be so framed as not merely **Revival of
right of
action.**

¹ Wood, Limitation of Actions, p. 586.

to bar the remedy, but to extinguish the right: such is the case as to realty under 3 & 4 Will. IV. c. 27: but in contract the remedy barred by 21 Jas. I. c. 16 may be revived.

In case of
specialty.

Where a specialty contract results in a money debt, the right of action may be revived for the statutory period of limitation, (1) by an acknowledgment of the debt in writing, signed by the party liable, or his agent; or (2) by part payment, or part satisfaction on account of any principal or interest due on such a specialty debt. Such a payment if made by the agent of the party liable will have the effect of reviving the claim.¹

3 & 4 Will.
IV. c. 42. § 5.

Of simple
contract.

By
promise.

9 Geo. IV.
c. 14. § 1.

19 & 20 Vict.
c. 97.

19 & 20 Vict.
c. 97. § 13.

In re River
Steamer Co.,
6 Ch. 528.

Where a simple contract has resulted in a money debt the right of action may also be revived by subsequent acknowledgment or promise, and this rule is affected by two statutes, Lord Tenterden's Act, which requires that the acknowledgment or promise, to be effectual, must be in writing; and the Mercantile Law Amendment Act, which provides that such a writing may be signed by the agent of the party chargeable, duly authorized thereto, and is then as effective as though signed by the party himself.²

The sort of acknowledgment or promise which is requisite in order to revive a simple contract debt for another period of six years, is thus described by Mellish, L.J.:—

‘There must be one of three things to take the case out of the Statute (of Limitation). Either there must be an acknowledgment

¹ The effect of an acknowledgment or promise in reviving a cause of action is confined to actions in assumpsit unless the statute gives a broader scope. *Ib.* p. 133 *et seq.* But a promise held out for a fraudulent purpose may work an estoppel. *Armstrong v. Levan*, 109 Pa. St. 177.

² Generally in the United States an acknowledgment must be in writing signed by the party to be charged or his authorized agent. Stimson, Am. St. Law, § 4147; Wood, Limitation of Actions, p. 209. But these statutes do not generally prevent the proof of acknowledgment by part payment. *Ib.*; though the construction is otherwise in some States. *Perry v. Ellis*, 62 Miss. 711; *Hale v. Wilson*, 70 Ia. 311.

[*320] *of the debt from which a promise to pay is implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed.'

This being the principle, its application in every case must turn on the construction of the words of the alleged promisor. And 'When the question is, what effect is to be given to particular words, little assistance can be derived from the effect given to other words in applying a principle which is admitted.'¹

Cleasby, B.,
in Skeet v.
Lindsay,
2 Ex. D. 317.

The debt, however, may be revived otherwise than by express acknowledgment or promise. A part payment, or payment on account of the principal, or a payment of interest upon the debt will take the contract out of the statute.² When this is so Lord Tenterden's Act provides that nothing therein contained 'shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person.' But the payment must be made with reference to the original debt, and in such a way as to amount to an acknowledgment of it. Payment to a third party is insufficient. Where the maker of a promissory note made a payment on account of the original payee after six years had expired, the note having, in the meantime, been indorsed to a third party, the payment was not an acknowledgment which revived the rights of the indorsee.

By pay-
ment.

Waters v.
Tompkins,
2 C. M. R.
723.

Stamford
Banking Co.
v. Smith,
[1892] 1 Q. B.
(C.A.) 765.

¹ An order or bill of exchange drawn by the debtor in favor of the creditor is an acknowledgment of the debt. *Manchester v. Braedner*, 107 N. Y. 346, H. & W. 635. But an acknowledgment in an undelivered instrument is insufficient. *Allen v. Collier*, 70 Mo. 138, H. & W. 637. See for words held a sufficient acknowledgment, *Schmidt v. Pfau*, 114 Ill. 483; *Blakeman v. Fonda*, 41 Conn. 561; *Weston v. Hodgkins*, 136 Mass. 326.

² *Blaskower v. Steel*, 23 Ore. 106.

CHAPTER IV.

Impossibility of Performance.

IMPOSSIBILITY of performance may appear on the face of the contract, or may exist, unknown to the parties, at the time of making the contract, or may arise after the contract is made. It is with this last sort of impossibility that we have to do.

Unreality
of con-
sideration.
p. 80.

Where there is obvious physical impossibility, or legal impossibility apparent upon the face of the promise, there is no contract, because such a promise is no *real consideration* for any promise given in respect of it.

Mistake.
Strickland
v. Turner,
7 Exch. 208,
ante, p. 134.

Impossibility which arises from the non-existence of the subject-matter of the contract avoids it. This may be based on mutual *mistake*,^a for the parties have contracted on an

^a There are two irreconcilable cases on this subject.

15 M. & W.
238.

In *Hills v. Sughrue*, Sughrue agreed with Hills by charter-party to take Sughrue's ship to the island of Ichaboe and there load a complete cargo of guano and return with it to England, being paid a high rate of freight. There was so little guano at Ichaboe that the performance of Sughrue's promise to load a complete cargo was impossible. Hills sued him for damages for failure to bring home a cargo, and was held to be entitled to recover: Impossibility of performance was held to be no answer to an absolute promise such as Sughrue had made.

L. R. 5 C. P.
577.

In *Clifford v. Watts* the parties were landlord and tenant. Clifford, the landlord, sued upon a covenant in the lease in which Watts undertook to dig from the premises not less than 1000 tons of potter's clay annually, paying a royalty of 2s. 6d. per ton. Watts pleaded that there never had been so much as 1000 tons of clay under the land. The court held that the plea furnished a good answer to the plaintiff's claim. 'Here,' said Brett, J., 'both parties might well have supposed that there was clay under the land. *They agree on the assumption that it is there; and the covenant is applicable only if there be clay.*' The cases are indistinguishable, and the conflict of judicial opinion would be perplexing if it were not that the Court of Common Pleas, in distinguishing *Hills v. Sughrue* from *Clifford v. Watts*, curiously misapprehended the point of the earlier case. It is clear that Willes, J. (p. 586, and Brett, J., p. 589), thought the action was brought by the shipowner against

15 M. & W.
258.
L. R. 5 C. P.
577.

[*322] *assumption, which turns out to be false, that there is something to contract about.¹

Impossibility which arises subsequently to the formation of a contract does not, as a rule, excuse from performance.² (1) **General rule.**

I have spoken of what are termed 'conditions subsequent,' or 'excepted risks,' and what was then said may serve to explain the rule now laid down. If the promisor make the performance of his promise conditional upon its continued possibility, the promisee takes the risk. If performance should become impossible, the promisee must bear the loss. If the promisor makes his promise unconditionally, he takes the risk of being held liable even though performance should become impossible by circumstances beyond his control.

supra,
p. 278.

Subsequent impossibility no excuse, unless a condition of the contract.

Paradine sued Jane for rent due upon a lease. Jane pleaded 'that a certain German prince, by name Prince Rupert, an alien born, enemy to the king and his kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled, and held out of possession whereby he could not take the profits.' The plea then was in substance that the rent was not due, because the lessee had been deprived, by events beyond his control, of the profits from which the rent should have come.

Paradine v. Jane, Aleyn, 26.

the charterer for not furnishing a cargo, whereas it was brought by the charterer against the owner for not loading a cargo which the owner, contrary to the ordinary practice in charter-parties, undertook to do (see *dicta* of Parke, B., 15 M. & W. 258-9). It seems that they unintentionally decided contrary to *Hills v. Sughrue*.

By the Sale of Goods Act, § 5, a contract for the sale of specific goods is avoided if the goods have perished unknown to the seller at the time the contract is made.

¹ *Ante*, p. 167, note; *Brick Co. v. Pond*, 38 Oh. St. 65.

² *Anderson v. May*, 50 Minn. 280, H. & W. 639; *Dermott v. Jones*, 2 Wall. (U. S.) 1, H. & W. 641.

But the court held that this was no excuse; 'and this difference was taken, that *where the law creates a duty or charge* and the party is disabled to perform it without any default in him, and hath no *remedy over, *there the law will excuse him*. As in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. . . . But when the party *by his own contract creates a duty or charge upon himself*, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, *because he might have provided against it by his contract*. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it.'

Modern illustrations of the rule are to be found in the promise made by the charterer of a vessel to the ship-owner that the cargo shall be unloaded within a certain number of days or payment made as 'demurrage.'

See Appen-
dix.

A cargo of timber was agreed to be made up into rafts by the master of the ship, and in that state removed by the charterer. Storms prevented the master from doing his part, but this default did not release the charterer from his promise to have the cargo unloaded within the time specified. So too a dock strike affecting the labour engaged both by ship-owner and charterer does not release the latter. He makes 'an absolute contract to have the cargo unloaded within a specified time. In such a case the merchant takes the risk.'¹

This v.
Byers,
1 Q. B. D.
244.

Budgett v.
Binnington,
[1891] 1 Q. B.
35.

(2) Exceptions.

To the general rule there is a group of exceptions, in which subsequent impossibility discharges the contract.

Act of God.

These we must distinguish from cases in which the Act of God is said to discharge a contract; for this use of the

Castlegate
Steamship
Co. v. Demp-
sey, [1892]
1 Q. B.
(C. A.) 854.

^a Compare this case with one in which the charter-party does not fix a definite time for unloading the cargo. In such cases a reasonable time is allowed, and the event of a dock strike would extend the time which should be regarded as reasonable.

¹ But if the carrier is under no express absolute obligation a strike will excuse delay beyond what would otherwise be reasonable. *Geis-mer v. Lake Shore &c. R.*, 102 N. Y. 563; *Pittsburg &c. R. v. Hollowell*, 65 Ind. 188.

term 'Act of God' has been condemned by high authority. The Act of God, as we have seen, is introduced into certain contracts as an express, or, by custom, an implied condition subsequent absolving the promisor.

Per curiam in *Baily v. De Crespigny*, L. R. 4 Q. B. at p. 185.

But there are also forms of impossibility which are said to excuse from performance because '*they are not within the contract*,' that is to say, that neither party can reasonably be supposed to have contemplated their occurrence, so that the promisor neither excepts *them specifically, nor promises unconditionally in respect of them. With these we will deal *seriatim*.

Real exceptions.

(i) *Legal impossibility arising from a change in the law of our own country exonerates the promisor.*¹

(i) **Where there be change of the law.**

L. R. 4 Q. B. 180.

Baily was lessee to De Crespigny, for a term of 89 years, of a plot of land: De Crespigny retained the adjoining land, and covenanted that *neither he nor his assigns* would, during the term, erect any but ornamental buildings on a certain paddock fronting the demised premises. A railway company, acting under parliamentary powers, took the paddock compulsorily, and built a station upon it. Baily sued De Crespigny upon the covenant: it was held that impossibility created by statute excused him from the observance of his covenant.

'The legislature, by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, *has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into*. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties.'

ibid. p. 186.

¹ *Cordes v. Miller*, 39 Mich. 581, H. & W. 645; *Hughes v. Wamsutta Mills*, 11 Allen (Mass.), 201, H. & W. 647; *People v. Globe Mut. Life Ins. Co.*, 91 N. Y. 174; *Jamieson v. Indiana Natural Gas Co.*, 128 Ind. 555.

(i) De-
struction
of subject-
matter.

(ii) *Where the continued existence of a specific thing is essential to the performance of the contract, its destruction, from no default of either party, operates as a discharge.*¹

3 B. & S. 826.

In the case of *Taylor v. Caldwell* the defendant agreed to let the plaintiff have the use of a music hall for the purpose of giving concerts upon certain days: before the days of performance arrived the music hall was destroyed by fire, and Taylor sued Caldwell for losses arising from the consequent breach of contract.

The court held that,

‘In the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.’

L. R. 2 C. P.
651.

The same principle was applied in *Appleby v. Myers*. The *plaintiffs undertook to erect certain ma-
chinery upon the defendant's premises and keep it [*325]
in repair for two years. While the work was in progress the premises were wholly destroyed by fire. It was held that there was no absolute promise by Myers that his premises should continue in a fit state for Appleby's work, that the fire was a misfortune equally affecting both parties, and discharging the contract.

56 & 57 Vict.
c. 71. § 7.

By the Sale of Goods Act an agreement to sell specific goods is avoided if, before the risk has passed to the buyer, by fault of neither party the goods perish.

¹ *Dexter v. Norton*, 47 N. Y. 62, H. & W. 649; *Stewart v. Stone*, 127 N. Y. 500; *Walker v. Tucker*, 70 Ill. 527; *The Tornado*, 108 U. S. 342; *Huguenin v. Courtenay*, 21 S. Car. 403. Where the contract contemplates work on a chattel or building the destruction of the latter discharges the contract, but recovery may be had for the work performed. *Cleary v. Sohler*, 120 Mass. 210; *Butterfield v. Byron*, 153 Mass. 517; *Niblo v. Binsse*, 3 Abb. App. Dec. (N. Y.) 375. If one contract against loss or destruction he is bound by the stipulations. *Wilming-ton Transportation Co. v. O'Neil*, 98 Calif. 1, H. & W. 654.

(iii) *A contract which has for its object the rendering of personal services is discharged by the death or incapacitating illness of the promisor.*¹

(iii) Incapacity for personal service.

In *Robinson v. Davison*, an action was brought for damage sustained by a breach of contract on the part of an eminent pianoforte player, who having promised to perform at a concert, was prevented from doing so by dangerous illness.

L. R. 6
Exch. 269.

The law governing the case was thus laid down by Bramwell, B. :—

‘This is a contract to perform a service which no deputy could perform, and which in case of death could not be performed by the executors of the deceased; and I am of opinion that, by virtue of the terms of the original bargain, incapacity of body or mind in the performer, without default on his or her part, is an excuse for non-performance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so; and as they have been silent on that point, the contract must, in my judgment, be taken to have been conditional and not absolute.’

ibid. p. 277.

¹ *Spalding v. Rosa*, 71 N. Y. 40, H. & W. 655; *Lacy v. Getman*, 119 N. Y. 109; *Johnson v. Walker*, 155 Mass. 253; *Allen v. Baker*, 86 N. C. 91.

An unforeseen peril, as the prevalence of cholera, may work a discharge of contract. *Lakeman v. Pollard*, 43 Me. 463. But see *Dewey v. Union School District &c.*, 43 Mich. 480.

CHAPTER V.

Discharge of Contract by Operation of Law.

THERE are rules of law which, operating upon certain sets of circumstances, will bring about the discharge of a contract, and these we will briefly consider.

Merger.

(1) **Mer-
ger.**

General
doctrine.

See p. 817.

If a higher security be accepted in the place of a lower, the security which in the eye of the law is inferior in operative power, *ipso facto*, whatever may be the intention of the parties, merges and is extinguished in the higher.

We have already seen an instance of this in the case of judgment recovered which extinguishes by *merger* the right of action arising from breach of contract.

And, in like manner, if two parties to a simple contract embody its contents in a deed which they both execute, the simple contract is thereby discharged.¹

The rules governing this process may be thus summarized:—

Higgen's
case, 6 Co.
Rep. 45 b.

(*a*) The two securities must be different in their legal operation, the one of a higher efficacy than the other. A second security taken in addition to one similar in character will not affect its validity, unless there be discharge by substituted agreement.

Holmes v.
Bell,
3 M. & G.
218.

(*β*) The subject-matter of the two securities must be identical.

(*γ*) The parties must be the same.

¹ *Clifton v. Jackson Iron Co.*, 74 Mich. 183, H. & W. 659.

[*327] **Alteration or loss of a written instrument.*

(2) *Alteration or loss of instrument.*

If a deed or contract in writing be altered by addition or erasure, it is discharged, subject to the following rules:—¹

(i) *Alteration,*

(a) The alteration must be made by a party to the contract, or by a stranger while the document is in the possession of a party to the contract and for his benefit.

Pattinson v. Luckley,
L. R. 10 Ex.
330.

Alteration by accident or mistake occurring under such circumstances as to negative the idea of intention will not invalidate the document.

Wilkinson v. Johnson,
3 B. & C.
428.

(β) The alteration must be made without the consent of the other party, else it would operate as a new agreement.

(γ) The alteration must be made in a material part. What amounts to a material alteration must needs depend upon the character of the instrument, and it is possible for the character of an instrument to be affected by an alteration which does not touch the contractual rights set forth in it. In a Bank of England note the promise to pay made by the bank is not touched by an alteration in the number of the note; but the fact that a bank note is a part of the currency, and that the number placed on it is put to important uses by the bank and by the public for the detection of forgery and theft, causes an alteration in the number to be regarded as material and to invalidate the note.²

materiality.

Suffell v. Bank of England,
9 Q. B. D.
555.

¹ *Wood v. Steele*, 6 Wall. (U. S.) 80. It is a disputed point whether an action can be brought upon the original contract. It is generally held that if the alteration was made with a fraudulent intent no action will lie upon the original consideration. *Smith v. Mace*, 44 N. H. 553, H. & W. 660. But if it was made with an innocent intent a recovery may be had on the original contract. *Clough v. Seay*, 49 Iowa, 111, H. & W. 675; *Owen v. Hall*, 70 Md. 97; *Savings Bank v. Shaffer*, 9 Neb. 1.

² *Contra: Commonwealth v. Emigrant Bank*, 98 Mass. 12; *Birdsall v. Russell*, 29 N. Y. 220; *Elizabeth v. Force*, 29 N. J. Eq. 587.

An alteration, therefore, to effect a discharge of the contract, need not be an alteration of the *contract*, but must be an 'alteration of the instrument in a material way.' The Bills of Exchange Act 1882 provides that a bill shall not be avoided as against a holder in due course, though it has been materially altered, 'if the alteration is not apparent:' and the provisions of the Act respecting bills apply to promissory notes 'with the necessary modifications.' These last words have been held to exclude Bank of England notes, and therefore do not affect the decision in *Suffell's* case.

46 & 47 Vict.
c. 61, § 64.

ibid. § 89.
Leeds Bank
v. Walker,
11 Q. B. D.
84.

(ii) **Loss.**

The loss of a written instrument only affects the rights *of the parties in so far as it may occasion a difficulty of proof;^a but an exception to this rule exists [*328] in the case of bills of exchange and promissory notes. If the holder of the instrument lose it, he loses his rights under it, unless he offer to the party primarily liable upon it an indemnity against possible claims.¹

Hansard v.
Robinson,
7 B. & C. 90.
Confians
Quarry Co.
v. Parker,
L. R.
8 C. P. 1.

Bankruptcy.

(3) **Bankruptcy.**

Bankruptcy effects a statutory release from debts and liabilities provable under the bankruptcy, when the bankrupt has obtained from the court an order of discharge.²

^a Where the documents are proved to be lost, parol evidence may be given of the contents of a written acknowledgment of a debt barred by the Statute of Limitation (*Haydon v. Williams*, 7 Bing. 163). In the case of a memorandum under the Statute of Frauds the matter is not clear (*Nichol v. Bestwick*, 28 L. J. Exch. 4).

¹ If the instrument is wilfully destroyed no action can be maintained. *Blade v. Noland*, 12 Wend. (N. Y.) 173, H. & W. 666. Cf. *Steele v. Lord*, 70 N. Y. 280.

² A State bankruptcy discharge has no effect upon debts contracted prior to the passage of the statute. *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, H. & W. 674. Nor upon the claims of foreign creditors unless the creditors become parties to the proceedings. *Gilman v. Lockwood*, 4 Wall. (U. S.) 409, H. & W. 683; *Guernsey v. Wood*, 130 Mass. 503, H. & W. 685. As to what claims are provable see *Reed v. Pierce*, 36 Me. 455, H. & W. 669.

It is sufficient to call attention to this mode of discharge, without entering into a discussion as to the nature and effects of bankruptcy, or the provisions of the Bankruptcy Act of 1883, or the amending Act of 1890.

46 & 47 Vict.
c. 52.
53 & 54 Vict.
c. 71.

When a man becomes bankrupt his property passes to his trustee, who can, as far as rights *ex contractu* are concerned (and we are not concerned with anything else), exercise the rights of the bankrupt, and can do what the bankrupt could not do, since he can repudiate contracts if they appear to be unprofitable.

supra, p. 254.

When the bankrupt obtains an order of discharge he is discharged from all debts provable under the bankruptcy, whether or no they were proved, and even if the creditor was in ignorance of the bankruptcy proceedings. But this general discharge is subject to exceptions. The court may require that the bankrupt should consent to judgment being entered against him for debts unsatisfied at the date of the discharge: and execution may be issued on such judgment with leave of the court.

46 & 47 Vict.
c. 52, § 28.
Heather v.
Webb,
2 C. P. D. 1.

Sub-§. 6.

In no case is the bankrupt discharged from liability incurred by fraud or fraudulent breach of trust exercised by him.

§ 30.

PART VI.

AGENCY.

WHEN dealing with the operation of contract we had to note that although one man cannot by contract with another confer rights or impose liabilities upon a third, yet that one man might represent another, as being employed by him, for the purpose of bringing him into legal relations with a third. Employment for this purpose is called agency.

The subject of agency is interesting as a matter of legal history, as well as of practical importance, but we can only deal with it in outline here, in its relation to contract.

Agency
a form of
employ-
ment;

English law, though it leaned strongly against the assignment of contractual or other rights of action, found no difficulty in permitting the representation of one man by another for purposes of contract or for wrong. And it seems that this liability of one for the act or default of another springs universally from the contract of employment.^a The liability of the master for the negligence of his servant is the undesigned result of such a contract; the liability of the principal for the act of his agent is its designed or contemplated result. But the master is not liable for the act of his servant done outside the scope of his employment, nor the principal for the act of his agent done outside the limits of his authority.

To discuss the law of master and servant from this point of view is out of place here, otherwise it might be

^a Writers on agency seem loth to recognize that agency is a form of employment. Yet in dealing with the principal's liability for the agent's wrong, they always introduce large selections from the law of master and servant.

[*330] interesting *to inquire how far the doctrine of representation in such cases is of modern origin. It may be that the form which the employer's liability has assumed in English law is an application to modern society of rules properly applicable to the relation of master and slave, where the master is liable for injury caused by that which is a part of his property.

But agency for the purpose of creating contractual relations retains no trace in English law of its origin in status. Even where a man employs as his agent one who is incapable of entering into a contract with himself, as where he gives authority to his child, being an infant, the authority must be given, it is never inherent. There must be evidence of intention on the one side to confer, on the other to undertake, the authority given, though the person employed may, from defective status, be unable to sue or be sued on the contract of employment.

From this rule we must, however, except that form of agency known as 'agency of necessity,' a quasi-contractual relation formed by the operation of rules of law upon the circumstances of the parties, and not by the agreement of the parties themselves.

except
agency of
necessity.

The rules which govern the relation of principal and agent fall into three chapters.

Outline of
subject.

1. The mode in which the relation is formed.

2. The effects of the relation when formed; and here we have to consider —

(a) The contract of employment as between principal and agent.

(β) The relations of the parties where the agent contracts for a principal whom he names.

(γ) The relations of the parties where the agent contracts as agent, but without disclosing the principal's name: or in his own name, without disclosing his principal's existence.

3. The mode in which the relation is brought to an end.

CHAPTER I.

The Mode in which the Relation of Principal and Agent is created.

(1) Capacity of parties.

FULL contractual capacity is not necessary to enable a person to represent another so as to bring him into legal relations with a third. An infant can be an agent, although he could not incur liability under the contract of employment. But no one can appoint an agent who is not otherwise capable of entering into contracts.¹

(2) Formation of relation.

Employment for the purpose of agency is brought about like any other contract by offer and acceptance.

(i) Employment. By offer of a promise for an act.

(a) This may take the form of consideration executed upon request, or the offer of a promise for an act. Such are all cases of requests for services, which, even if gratuitously rendered, entitle the person employed to an indemnity for loss, risk, or expense, and the employer to the exercise of reasonable diligence on the part of the employed.

ante, p. 95.

ante, p. 84.

Care should be taken to distinguish a contract of this nature, which only comes into existence upon the rendering of the service demanded, from the anomalous contract of gratuitous employment, based on mutual promises, which becomes actionable when the service is entered upon. *Lampleigh v. Braithwait* is an illustration of the first, *Wilkinson v. Coverdale* of the second.

But we must bear in mind that 'agency' is not co-

¹ On competency of agent see *Lyon v. Kent*, 45 Ala. 656. On competency of principal see *Patterson v. Lippincott*, 47 N. J. L. 457; ante, p. 131 note 2 (infants); *Matthiessen & Co. v. McMahon's Adm'r*, 38 N. J. L. 536 (insanity); *Flesh v. Lindsay*, 115 Mo. 1 (married women). See generally Huffcut on Agency, §§ 14-25.

extensive with 'employment,' though writers careless of terminology are apt to speak generally of a person employed as the agent of the employer. By agency I mean employment *for the *purpose of bringing the* Employment a wider term than agency.
 [*332] *employer into legal relations with a third party.*

(β) Or secondly, the relation may be created by the acceptance of an executed consideration. Such is the case where *A* ratifies a contract which *X*, without any antecedent authority, has made on his behalf. *A* accepts the bargain and thereby takes over its liabilities from *X*. By offer of an act for a promise; as by ratification.

(γ) Or thirdly, the relation may be created by mutual promises, to employ and remunerate on one side, and to do the work required on the other. By offer of a promise for a promise.

We will now speak no longer of employer and employed, but of principal and agent. The authority given by the principal to the agent, enabling the latter to bind the former by acts done within the scope of that authority, may be given by writing, words, or conduct. Formal grant of authority

In one case only is it necessary that the authority should be given in a special form. In order that an agent may make a binding contract under seal it is necessary that he should receive authority under seal. Such a formal authority is called a *power of attorney*.¹ requisite for contract under seal.

Nothing need be said as to the formation of the contract by writing or words which has not been said in the chapter on offer and acceptance. As regards its formation by conduct the inference of intention may be affected by the relation in which the parties stand to one another. (ii) Conduct:

If a master allows his servant to purchase goods for him of *X* habitually, upon credit, *X* becomes entitled to look to the master for payment for such things as are supplied in the ordinary course of dealing. in case of master and servant:

1 Shower, 95.

¹ Parol authority is sufficient if the seal is unnecessary to the operative effect of the instrument. *Wagoner v. Watts*, 44 N. J. L. 126. Or if the instrument be executed in the presence of the principal. *Gardner v. Gardner*, 5 Cush. (Mass.) 483.

of husband and wife:

Debenham v. Mellon, Thesiger, L. J., 5 Q. B. D. 403.

So too with husband and wife. Cohabitation does not necessarily imply agency. But if the wife is allowed to deal with a tradesman for the ordinary supplies of the household, the husband will be considered to have held her out as his agent and to be liable for her purchases.

Yet there is nothing in the relations of master and servant *or husband and wife, to give any inherent authority to the servant or the wife. The authority [*333] can only spring from the words or conduct of the master or husband.

different rule for partners.

53 & 54 Vict. c. 39, § 5. Hawken v. Bourne, 8 M. & W. 710.

We can see this more clearly, if we contrast these relations with that of partnership. Marriage does not of itself create the relation of agent and principal: partnership does. The contract of partnership confers on each partner an authority to act for the others in the ordinary course of the partnership business. And each partner accepts a corresponding liability for the act of his fellows.

The relations above described, marriage and employment, enable an authority to be readily inferred from conduct. But apart from these, the mere conduct of the parties may create an irresistible inference that an authority has been conferred by one upon the other.

15 East, 88.

In *Pickering v. Busk* the plaintiff allowed a broker to purchase for him a quantity of hemp, which by the plaintiff's desire was entered in the place of deposit in the broker's name. The broker sold the hemp and it was held that the conduct of the plaintiff gave him authority to do so.

ibid., 43.

'Strangers,' said Lord Ellenborough, 'can only look to the acts of the parties and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker: and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority.'

We may, if we please, apply to these cases (excepting, of course, partnership) the term agency by *estoppel*. They

differ only in the greater or less readiness with which the presumption will be created by the conduct of the parties. For *estoppel* means only that a man may not resist an inference which a reasonable person would necessarily draw from his words or conduct.¹

Circumstances operating upon the conduct of the parties may create in certain cases agency *from necessity*. (iii) **Necessity:**

[*334] *A husband is bound to maintain his wife: if therefore he wrongfully leave her without means of subsistence she becomes 'an agent of necessity to supply her wants upon his credit.'

Eastland v. Burchell, 8 Q. B. D. at p. 486; and see Wilson v. Glossop, 20 Q. B. D. (C. A.) 354.

A carrier of goods, or a master of a ship, may under certain circumstances, in the interest of his employer, pledge his credit, and will be considered to have his authority to do so. It has even been held that where goods are exported, unordered, or not in correspondence with samples, the consignee has, in the interest of the consignor, an authority to effect a sale of them. But here the relation of principal and agent does not arise from agreement, it is imposed by law on the circumstances of the parties. The agent occupies the position of the *negotiorum gestor* of Roman law.²

may create agency *quasi ex contractu*.

Kemp v. Pryor, 7 Ves. 246.

[Gwilliam v. Twist, 43 W. R. 566.]

It remains to consider ratification, or the adoption by *A* of the benefit and liabilities of a contract made by *X* on his behalf, but without his authority. (iv) **Ratification:**

The rules which govern ratification may be stated thus:—

The agent must contract as agent, for a principal who is in contemplation, and who must also be in existence at the time, for such things as the principal can and lawfully may do.

rules which govern it.

¹ *Martin v. Webb*, 110 U. S. 7; *Johnson v. Hurley*, 115 Mo. 513.

² *Benjamin v. Dockham*, 131 Mass. 418; *McCready v. Thorn*, 51 N. Y. 454; *Terre Haute &c. R. v. McMurray*, 98 Ind. 358. Cf. *Sevier v. Birmingham &c. R.*, 92 Ala. 258. *Huffcut on Agency*, §§ 54–59.

‘An act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be in tort or in contract.’

Wilson v.
Tumman,
6 M. & G.
242.

(a) The agent must contract as agent.

Agency
must be
declared,

He must not incur a liability on his own account and then assign it to some one else under colour of ratification. If he has a principal and contracts in his own name he cannot divest himself of the liability to have the contract enforced against him by the party with whom he dealt, who is entitled under such circumstances to the alternative liability of the agent and principal. If he has no principal and contracts in his own name he can only divest himself of his rights and *liabilities in favour of another by *assignment* to that other; subject to the [*335] rules laid down in Part II. ch. ii. § 1.

See post,
p. 350.

(b) The agent must act for a principal who is in contemplation.¹

for a con-
templated
principal,

Wilson v.
Tumman,
6 M. & G.
242.

He must not make a contract, as agent, with a vague expectation that parties of whom he is not cognizant at the time will relieve him of its liabilities. The act must be ‘done *for another* by a person not assuming to act for himself but for such other person.’ This does not prevent ratification in the case of a broker who makes contracts, as agent, expecting that customers with whom he is in the habit of dealing will take them off his hands. Thus, in contracts of marine insurance, persons ‘who are not named or ascertained at the time the policy is effected are allowed to come in and take the benefit of the insurance. *But then they must be persons who were contemplated at the time the policy was made.*’

Watson v.
Swann,
11 C. B.,
N. S. 769.

So too where work is done on behalf of the estate of a

¹ *Hamlin v. Sears*, 82 N. Y. 327; *Western Pub. House v. District Tp. of Rock*, 84 Iowa, 101.

deceased person, if it is done by order of one who afterwards becomes administrator and ratifies the contract for the work so done, such a ratification creates a binding promise to pay for the work. Here there is a principal contemplated and existent, though he has no title to act as principal until he has obtained letters of administration.

In re Wat-
son, 18
Q. B. D. 116.

(c) The principal must be in existence.¹

This rule is important in its bearing on the liabilities of companies for contracts made by the promoters on their behalf before they are formed. In *Kelner v. Baxter* the promoters of a company as yet unformed entered into a contract on its behalf and the company when duly incorporated ratified the contract. It became bankrupt and the defendant who had contracted as its agent was sued upon the contract. It was argued that the liability had passed, by ratification, to the company and no longer attached to the defendant, but the court held that this could not be.

who is in
existence.

L. R. 2 C. P.
174.

‘Could the “company,”’ said Willes, J., ‘become liable by a mere ratification? Clearly not. Ratification can only be by a *person ascertained at the time of the act done,—by a person in existence either actually or in contemplation of law, as in the case of the assignees of bankrupts, or administrators whose title for the protection of the estate vests by relation.’

ibid. p. 184.

(d) The agent must contract for such things as the principal can, and lawfully may do.

There can be no ratification of a void act. And so if an agent enter into a contract on behalf of a principal who is incapable of making it, or if he enter into an illegal contract, no ratification is possible. The transaction is void, in the one case from the incapacity of the principal, in the other from the illegality of the act.²

Mann v.
Edinburgh
Northern
Tramways
Co., [1898]
A. C. 79.

¹ *McArthur v. Times Printing Co.*, 48 Minn. 319; *Bell's Gap R. R. v. Christy*, 79 Pa. St. 54.

² *Milford v. Water Co.*, 124 Pa. St. 610.

Brook v.
Hook, L. R.
6 Exch. 89.

On this last ground it has been found that a forged signature cannot be ratified, but ratification is not here in question. For one who forges the signature of another is not an agent, actually or in contemplation. The forger does not act for another, he personates the man whose signature he forges.¹

And the principal who accepts the contract made on his behalf by one whom he thereby undertakes to regard as his agent, may, as in the acceptance of any other simple contract, signify his assent by words or by conduct. He may avow his responsibility for the act of his agent, or he may take the benefit of it, or otherwise by acquiescence in what is done create a presumption of authority given. Where conduct is relied upon as constituting ratification the relations of the parties and their ordinary course of dealing may create a greater or less presumption that the principal is liable.

¹ *Accord: Henry v. Heeb*, 114 Ind. 275; *Workman v. Wright*, 33 Oh. St. 405. *Contra: Greenfield Bank v. Crafts*, 4 Allen (Mass.), 447; *Hefner v. Vandolah*, 62 Ill. 483.

CHAPTER II.

Effect of the Relation of Principal and Agent.

THE effects of the relation of principal and agent when created as described above may be thus arranged.

1. The rights and liabilities of principal and agent *inter se*.

2. The rights and liabilities of the parties where an agent contracts as agent for a named principal.

3. The rights and liabilities of the parties where an agent contracts for a principal whose name, or whose existence, he does not disclose.

1. THE RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT *inter se*. (1) Principal and agent.

The relations of principal and agent *inter se* are made up of the ordinary relations of employer and employed, and of those which spring from the special business of an agent to bring two parties together for the purpose of making a contract—to establish privity of contract between his employer and third parties. Relations of principal and agent.

The principal must pay the agent such commission, or reward for the employment, as may be agreed upon between them. He must also indemnify the agent for acts lawfully done and liabilities incurred in the execution of his authority.¹ (i) Duty of principal: to indemnify or reward.

The agent is bound, like every person who enters into a contract of employment, to account for such property of (ii) Duty of agent:

¹ *Bibb v. Allen*, 149 U. S. 481.

(a) ac-
counting;
(b) dili-
gence;
(c) skill;
Jenkins v.
Betham,
15 C. B. 168.
(d) good
faith.

his employer as comes into his hands in the course of the employment; to use ordinary diligence in the discharge of his duties; to display any special skill or capacity which he may profess for the work in hand.¹

*The agent must make no profit out of transactions into which he may enter on behalf of his principal [*338] in the course of the employment beyond the commission agreed upon between them.

Bad faith:
by taking
reward
from
others;

Where an agent is promised a reward which might induce him to act disloyally to his employer, he cannot recover the money promised to him.

An engineer in the employ of a railway company was promised by the defendant company a commission the consideration for which was, partly the superintendence of their work, partly the use of his influence with the railway company to obtain an acceptance by them of a tender made by his new employers. He did not appear in fact to have advised his first employers to their prejudice, but it was held that he could not recover in an action brought for this commission. 'It needs no authority to show that, even though the employers are not actually injured and the bribe fails to have the intended effect, a contract such as this is a corrupt one and cannot be enforced.'

Harrington
v. Victoria
Graving
Dock Co.,
3 Q. B. D.
549.

The agent, if he obtains money by a transaction of this nature, is bound to account for it to his principal, or pay it over to him. If he does not do so the money can be recovered by the principal as a debt due to him.²

L. R. 9 Q. B.
480.

In *Morison v. Thompson* the defendant was employed as broker by the plaintiff to purchase a ship from X. X had promised his broker that he would allow him to keep any excess of the purchase money over £8500. The defendant bought the ship for his employer for £9250, and

¹ *Page v. Wells*, 37 Mich. 415; *Laverty v. Snethen*, 68 N. Y. 522; *Kiewert v. Rindskopf*, 46 Wis. 481.

² *Boston v. Simmons*, 150 Mass. 461.

received by arrangement with the broker of X the sum of £225, a portion of the excess price. The plaintiff discovered this and sued his agent for £225 as money received to his use, and it was held that he could recover the money.

But the agent is his principal's debtor, not his trustee for money so received. If the money is invested in land or securities these cannot be claimed by the principal, any more than he can claim profits made out of the sums thus [*339] *received. They constitute a debt due to him, and this he can recover.

Lister & Co. v. Stubbs, 45 Ch. D. 15.

The agent may not depart from his character as agent and become a principal party to the transaction even though this change of attitude do not result in injury to his employer. If a man is employed to buy or sell on behalf of another he may not sell to his employer or buy of him.¹

by becoming principal as against his employer.

See *Story on Agency*, §§ 210, 211.

Nor if he is employed to bring his principal into contractual relations with others may he assume the position of the other contracting party.

In illustrating these propositions we may usefully distinguish employment to buy upon commission, from employment to represent a buyer or seller: the one is commission agency, which is not agency in the strict sense of the word, the other is genuine agency.

Compare:

(1) A may agree with X to purchase goods of X at a sale, price fixed upon. This is a simple contract of sale and each party makes the best bargain for himself that he can.

(2) Or A may agree with X that X shall endeavour to procure certain goods and when procured sell them to A , receiving not only the price at which the goods were purchased but a commission or reward for his exertions in procuring them.

commission agency,

¹ *Davis v. Hamlin*, 108 Ill. 39; *Gardner v. Ogden*, 22 N. Y. 327; *Geisinger v. Beyl*, 80 Wis. 443.

Here we have a contract of sale with a contract of employment added to it, such as is usually entered into by a commission agent or merchant, who supplies goods to a foreign correspondent. In such a case the seller procures and sells the goods not at the highest but at the lowest price at which they are obtainable: what he gains by the transaction is not a profit on the price of the goods but a payment by way of commission, which binds him to supply them according to the terms of the order or as cheaply as he can.

Ireland v. Livingston,
L. R. 5 H. L.
407.

If a seller of goods warranted them to be of a certain quality he would be liable to the buyer, on the non-fulfilment of the warranty, for the difference in value between the goods promised and those actually supplied. If a commission agent undertakes to procure goods of a certain quality and fails to *do so the measure of damages [*340] is the loss which his employer has actually sustained, not the profit which he might have made. A seller of goods with a warranty promises that they shall possess a certain quality. A commission agent only undertakes to use his best efforts to obtain goods of such a quality for his employer.

Cassaboglon v. Gibbs,
9 Q. B. D.
220.

And here the person employed has no authority to pledge his employer's credit to other parties, but undertakes simply to obtain and supply the goods ordered on the best terms. Yet it would seem that he might not, without his employer's assent, supply the goods himself, even though they were the best obtainable and supplied at the lowest market price. This is an implied term in his contract of employment.

Rothschild v. Brookman, 2 Dow & Cl. 188.

brokerage.

(3) Or thirdly, *A* may agree with *X* that in consideration of a commission paid to *X* he shall make a bargain for *A* with some third party. *X* is then an agent in the true sense of the word, a medium of communication to establish privity of contract between two parties.

Under these circumstances it is imperative upon *X* that

he should not divest himself of his character of agent and become a principal party to the transaction. This may be said to arise from the fiduciary relation of agent and principal: the agent is bound to do the best he can for his principal; if he put himself in a position in which he has an interest in direct antagonism to this duty, it is difficult to suppose that the special knowledge, on the strength of which he was employed, is not exercised to the disadvantage of his employer. Thus if a solicitor employed to effect a sale of property purchase it, nominally for another, but really for himself, the purchase cannot be enforced.

Agent to make a contract must remain agent.

McPherson v. Watt, 3 App. Ca. 254.

But we may put the rule on another ground. If *A* employs *X* to make a bargain for him with some third party, the contract of employment is not fulfilled if *X* make the bargain for himself. The employer may sustain no loss, but he has not got what he bargained for.

Thus in *Robinson v. Mollett* the defendant gave an order to *the plaintiff, a broker in the tallow trade, for [*341] the purchase of a quantity of tallow. In accordance with the custom of the market the broker did not establish privity of contract between the defendant and a seller, but simply appropriated to him an amount of tallow, corresponding to the order, which he had purchased from a selling broker.

L. R. 7 H. L. 802.

It was held that the defendant could not be required to accept goods on these terms, and that he was not bound by a custom of the market of which he was not aware and which altered the 'intrinsic character' of the contract. The broker was employed to make a contract on behalf of his principal, he had in fact made a sale to him, and the House of Lords held that such a transaction could not be supported.¹

Robinson v. Mollett, L. R. 7 H. L. 802.

¹ Cf. *Terry v. Birmingham Nat. Bk.*, 99 Ala. 566; *Skiff v. Stoddard*, 63 Conn. 198.

(e) Not to delegate authority. 'The agent may not, as a rule, depute another person to do that which he has undertaken to do.

The reason of this rule, and its limitations, are thus stated by Thesiger, L.J., in *De Bussche v. Alt*.

'As a general rule, no doubt, the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analyzed merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken personally to fulfil; and that inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident to the contract.'

The Lord Justice points out that there are occasions when such an authority must needs be implied, occasions springing from the conduct of the parties, the usage of a trade, the nature of a business, or an unforeseen emergency, 'and that when such implied authority exists and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts on him, as if he had been appointed agent by the principal himself.'¹

*But where there is no such implied authority and the agent employs a sub-agent for his own convenience, no privity of contract arises between the principal and the sub-agent. On default of the agent the principal cannot intervene as an undisclosed principal to the contract between agent and sub-agent. Nor can he treat the sub-agent as one employed by him, and follow and reclaim property which has passed into the sub-agent's hands.²

New Zealand Co. v. Watson,
7 Q. B. D.
(C. A.) 874.

¹ *Harralson v. Stein*, 50 Ala. 347; *Grady v. American Cent. Ins. Co.*, 60 Mo. 116; *Newell v. Smith*, 49 Vt. 255.

² *Exchange Nat. Bk. v. Third Nat. Bk.*, 112 U. S. 276.

II. RIGHTS AND LIABILITIES OF THE PARTIES WHERE AN AGENT CONTRACTS FOR A NAMED PRINCIPAL.

Where an agent contracts, as agent, for a named principal, so that the other party to the contract looks through the agent to a principal whose name is disclosed, it may be laid down, as a general rule, that the agent drops out of the transaction so soon as the contract is made.

(2) Dis-
closed
principal.
(i) Au-
thorized
contract.
(a) Agent
for named
principal
drops out
when
contract
made,

Where the transaction takes this form only two matters arise for discussion: the nature and extent of the agent's authority; and the rights of the parties where an agent enters into contracts, either without authority or in excess of an authority given to him.

Much trouble has been wasted in distinguishing general from special agents as though they possessed two sorts of authority different in kind from one another. But there is no such difference.

If John Styles, having authority to act on behalf of Richard Roe and describing himself as agent for Richard Roe, makes a contract on Roe's behalf with John Doe, he brings Roe and Doe into the relation of two contracting parties, and himself drops out. The authority may have been wide or narrow, general or special, but the difference is only one of degree.

whether
authority
is general
or special.

For instance, *X* sends *A* to offer £100 for *M*'s horse Robin Hood, or to buy the horse for a price not exceeding £100, or for as low a price as he can, or to buy the best horse in *M*'s stable at the lowest price, or *X* sends *A* [*343] to London to get the best horse he can at the lowest price, or *X* agrees with *A* that *A* shall keep him supplied with horses of a certain sort and provide for their keep: all these cases differ from one another in nothing but the extent of the authority given, there is no difference in kind between any one of the cases and any other: in none of them does *A* incur any personal liability to *M* or any one with whom he contracts on behalf of *X* so long as he acts as agent, names his principal, and keeps within the limits of his authority.

ante, p. 338. It should be observed—indeed it follows from what has been said, that *X* cannot by private communications with *A* limit the authority which he has allowed *A* to assume.

Maddick v. Marshall, 16 C. B., N. S. 393. ‘There are two cases in which a principal becomes liable for the acts of his agent—one where the agent acts within the limits of his authority, the other where he transgresses the actual limits but acts within the apparent limits, where those apparent limits have been sanctioned by the principal.’

Edmunds v. Bushell and Jones, L. R. 1 Q. B. 97. Jones employed Bushell as manager of his business, and it was incidental to the business that bills should be drawn and accepted from time to time by the manager. Jones however forbade Bushell to draw and accept bills. Bushell accepted some bills, Jones was sued upon them and was held liable. ‘If a man employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority.’¹

We may note here the sort of authority with which certain kinds of agents are invested in the ordinary course of their employment.

Auctioneer. (a) An auctioneer is an agent to sell goods at a public auction. He is primarily an agent for the seller, but, upon the goods being knocked down, he becomes also the agent of the buyer; and he is so for the purpose of the signatures of both parties within the meaning of the 4th section of the Statute of Frauds and of the Sale of Goods Act. He has not merely an authority *to sell, but actual possession of the goods, and a lien upon them [*344] for his charges. He may sue the purchaser in his own name, and even where he contracts avowedly as agent, and for a known principal, he may introduce such terms

¹ *Hatch v. Taylor*, 10 N. H. 538; *Howell v. Graff*, 25 Neb. 130; *Butler v. Maples*, 9 Wall. (U. S.) 766.

into the contract made with the buyer as to render himself personally liable.¹

Woolfe v.
Horne,
2 Q. B. D.
355.

(b) A factor by the rules of common law and of mercantile usage is an agent to whom goods are consigned for the purpose of sale, and he has possession of the goods, authority to sell them in his own name, and a general discretion as to their sale. He may sell on the usual terms of credit, may receive the price, and give a good discharge to the buyer.

Factor.

He further has a lien upon the goods for the balance of account as between himself and his principal, and an insurable interest in them. Such is the authority of a factor at common law, an authority which the principal cannot restrict, as against third parties, by instructions privately given to his agent.

Pickering
v. Busk,
15 East, 38.

By the Factors Act 1889^a the presumed authority of the factor is extended. Persons who, in good faith, advance money on the security of goods or documents of title are thereby given assurance that the possession of the goods, or of the documents of title to them, carries with it an authority to pledge them.

52 & 53 Vict.
c. 44.

And so long as the agent is left in possession of the goods revocation of authority by the principal does not prejudice the right of the buyer or pledgee if the latter has not notice of the revocation at the time of the sale or pledge.²

(c) A broker is an agent primarily to establish privity of contract between two parties. Where he is a broker for sale he has not possession of the goods, and so he has not the authority thence arising which a factor enjoys. Nor

Broker.

^a This act consolidates the four previous acts of 1823, 1825, 1842, 1877.

¹ *Walker v. Herring*, 21 Gratt. (Va.) 678; *Thompson v. Kelly*, 101 Mass. 291.

² For Factors Acts see Stimson, Am. St. Law, §§ 4380-88.

has the authority to sue in his own name on contracts made by him.

*The forms of a broker's notes of sale may be useful as illustrating what has hereafter to be said with reference to the liabilities of parties where an agent contracts for a principal whose name or whose existence he does not disclose. [*345]

When a broker makes a contract he puts the terms into writing and delivers to each party a copy signed by him. The copy delivered to the seller is called the sold note, that delivered to the buyer is called the bought note. The sold note begins 'Sold for *A* to *X*' and is signed '*M* broker,' the bought note begins 'Bought for *X* of *A*' and is signed '*M* broker.' But the forms may vary and with them the broker's liability. We will follow these in the sold note.

(i) 'Sold for *A* to *X*' (signed) '*M* broker.' Here the broker cannot be made liable or acquire rights upon the contract: he acts as agent for a named principal.

(ii) 'Sold for you to our principals' (signed) '*M* broker.' Here the broker acts as agent, but for a principal whom he does not name. He can only be made liable by the usage of the trade if such can be proved to exist.

(iii) 'Sold by you to me' (signed) *M*. Here we suppose that the broker has a principal, though his existence is not disclosed, nor does the broker sign as agent. He is personally liable, though the seller may prefer to take and may take the liability of the principal when disclosed; and the principal may intervene and take the benefit of the contract.¹

(d) A commission agent is, as was described above, a person employed, not to establish privity of contract

Forms of
bought
and sold
notes.

Fairlie v.
Penton,
L. R. 5 Ex.
109.

Southwell v.
Bowditch,
1 C. P. D.
(C. A.) 374.

Fleet v.
Murton,
L. R. 7 Q. B.
126.

Higgins v.
Senior,
8 M. & W.
834.

Commis-
sion agent.

¹ *Darrow v. Horne Produce Co.*, 57 Fed. Rep. 463.

between his employer and other parties, but to buy or sell goods for him on the best possible terms, receiving a commission as the reward of his exertions.

ante, p. 340.
Ireland v. Livingston, L. R. 5 H. L. 407.

(e) A *del credere* agent is an agent for the purpose of sale, and gives, besides, an undertaking to his employer that the parties with whom he is brought into contractual relations will perform the engagements into which they enter.

Del credere agent.

[*346] *He does not guarantee the solvency of these parties, or promise to answer for their default: his undertaking does not fall under 29 Car. II. c. 3. § 4, but is rather a promise of indemnity to his employer against his own inadvertence or ill-fortune in making contracts for him with persons who cannot or will not perform them.¹

I have said that the agent contracting within his authority for a named principal drops out of the transaction. As a rule he acquires neither rights nor liabilities on a contract so made.

(b) Agent cannot sue or be sued.

Plainly he cannot sue; for the party with whom he contracted has been induced by him to look to the named principal, and cannot, unless he so choose, be made liable to one with whom he dealt merely as the mouthpiece of another.

Bickerton v. Burrell, 5 M. & S. 383.

And this is so though the professed agent be the real principal. If John Styles agrees to sell his goods to John Doe describing himself as the agent and the goods as the property of Richard Roe, he cannot enforce the contract, for it was not made with him.²

Lewis v. Nicholson, 18 Q. B. 503.

With a few exceptions he cannot be sued.^a

Exceptions.

^a Parol contracts have been framed so as to leave it uncertain whether the agent meant to make himself personally liable. But these do not affect the rule.

Lennard v. Robinson, 5 E. & B. 125.

¹ *Lewis v. Brehme*, 33 Md. 412; *Wolff v. Koppel*, 5 Hill (N. Y.), 458.

² *Dicey on Parties* (Am. ed. 1879), 165.

Deed.

An agent who makes himself a party to a deed is bound thereby, though he is described as agent. This arises from the formal character of the contract, and the technical rule that 'those only can sue or be sued upon an indenture who are named or described in it as parties.'¹

Beckham v. Drake,
9 M. & W.
95.

Foreign principal.

An agent who contracts on behalf of a foreign principal has, by the usage of merchants, no authority to pledge his employer's credit, and becomes personally liable on the contract.²

Armstrong v. Stokes,
L. R. 7 Q. B.
605.

Non-existent principal.

If an agent contracts on behalf of a principal who does not exist or cannot contract, he is liable on a contract so made.³

L. R. 2 C. P.
175.

*The case of *Kelner v. Baxter* was cited above to show that a company cannot ratify contracts made on its behalf before it was incorporated: the same case establishes the rule that the agent so contracting incurs the liabilities which the company cannot by ratification assume. 'Both upon principle and upon authority,' said Willes, J., 'it seems to me that the company never could be liable upon this contract, and construing this document *ut res magis valeat quam pereat*, we must assume that the parties contemplated that the persons signing it would be personally liable.'

(ii) Unauthorized contract.

If a man contracts as agent, but without authority for a principal whom he names, he cannot bind his alleged principal or himself by the contract: but the party whom he induced to contract with him has one of two remedies.

Remedies against agent.

(a) If the alleged agent honestly believed that he had

¹ *Briggs v. Partridge*, 64 N. Y. 357; *Borcherling v. Katz*, 37 N. J. Eq. 150.

² The presumption is otherwise in the United States. *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244; *Oelricks v. Ford*, 23 How. (U. S.) 49.

³ *Patrick v. Bowman*, 149 U. S. 411; *Lewis v. Tilton*, 64 Iowa, 220.

an authority which he did not possess he may be sued upon a warranty of authority.¹ (a) Warranty of authority.

This is an implied promise to the other party that in consideration of his making the contract the professed agent undertakes that he is acting with the authority of a principal.

Directors of a building society borrowed money on its behalf, which the society had no power to borrow, and the lender, being unable to recover the loan from the society, sued the directors. They were held liable *ex contractu* as having impliedly undertaken that they had an authority to bind the society.

Richardson
v. Wil-
liamson,
L. R. 6 Q. B.
276.

‘Persons who induce others to act on the supposition that they have authority to enter into a binding contract on behalf of third persons, on it turning out that they have no such authority, may be sued for damages for the breach of an implied warranty of authority. This was decided in *Collen v. Wright* and other cases.’

8 E. & B.
647.

It would be satisfactory to find a better ground for the agent’s liability in such cases than the creation of a warranty or promise which is never contemplated by the parties at the time when it is supposed to be made. Indeed the doctrine of the warranty of authority was only admitted in the leading *case on the subject under [*348] protest from a very high authority. The difficulty is occasioned by the common law rule that no action lies for damages caused by innocent misrepresentation. But the Court of Appeal has lately placed the liability of the professed agent on this very ground, describing it as an exception to the general rule of law that ‘an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another.’ If this may be accepted as the true ground of action we are well rid of a grotesque legal fiction.

Cockburn,
C. J., in
Collen v.
Wright.

Firbank’s
Exors. v.
Humphreys,
Lindley,
L. J.
18 Q. B. D.
(C. A.) 62.

¹ *Kroeger v. Pitcairn*, 101 Pa. St. 311; *Baltzen v. Nicolay*, 53 N. Y. 467.

(b) Action
of deceit.

(b) If the professed agent knew that he had not the authority which he assumed to possess, he may be sued by the injured party in the action of deceit.¹

8 B. & A.
114.

The case of *Polhill v. Walter* is an illustration of this. The defendant accepted a bill as agent for another who had not given him authority to do so. He knew that he had not the authority but expected that his act would be ratified. It was not ratified, the bill was dishonoured, and the defendant was held liable to an indorsee of the bill as having made a representation of authority false to his knowledge, and falling under the definition of fraud given in a previous chapter.

The reason why the alleged agent should not be made personally liable on such a contract is plain. The man whom he induced to enter into the contract did not contemplate him as the other party to it, or look to any one but the alleged principal. His remedy should be, as it is, for misrepresentation, innocent or fraudulent.

(3) Undis-
closed
principal.

III. RIGHTS AND LIABILITIES OF THE PARTIES WHERE THE PRINCIPAL IS UNDISCLOSED.

Where the name of the principal is not disclosed.

Denman,
C.J., in
Humble v.
Hunter,
12 Q. B. 817.

A man 'has a right to the benefit which he contemplates from the character, credit and substance of the person with whom he contracts;' if therefore he enters into a contract with an agent who does not give his principal's name, the *presumption is that he is invited to give credit to the agent. Still more if the agent do not disclose his principal's existence. In the last case invariably, in the former case within certain limits, the party who contracts with an agent on these terms gets the benefit of an alternative liability and may elect to sue agent or principal upon the contract.²

(i) Where
principal's
name is
undis-
closed.

¹ *Noyes v. Loring*, 55 Me. 408.

² *Byington v. Simpson*, 134 Mass. 169; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53.

An agent who contracts as agent but does not disclose the name of his principal, is said to render himself personally liable if the other party to the contract choose to treat him so, but this must depend on the construction of terms. The exceptions to the general rule are wide and its application in reported cases is not as frequent as might be expected. We may state two propositions, which must be taken subject to exceptions to be hereafter mentioned:—

Liability
of agent:

Thomson v.
Davenport,
9 B. & C. 78.

(1) An agent who contracts for an unnamed principal, *as agent* will not be personally liable.¹

contract-
ing as
agent;

The agent who describes himself as such in the contract, and signs himself as such, if the contract be in writing, protects himself against liability.

‘There is no doubt at all in principal,’ said Blackburn, J., in *Fleet v. Murton*, ‘that a broker as such, merely dealing as broker and not as purchaser, makes a contract, *from the very nature of things*, between the buyer and seller, and is not himself either buyer or seller, and that consequently where the contract says “sold to AB” or “sold to my principals” and the broker signs himself simply as broker he does not make himself by that either the purchaser or seller of the goods.’

L. R. 7 Q. B.
126,

and see
Southwell v.
Bowditch,
1 C. P. D.
(C. A.) 374.

(2) An agent who contracts for an unnamed principal, without expressly contracting as agent, will be personally liable.

not con-
tracting as
agent.

In the absence of words indicating agency, the word ‘broker’ attached to a signature is merely descriptive and does not limit liability, so that if the agent do not by words exclude himself from liability, it may be assumed that one who deals with an agent for an unnamed principal expects and is entitled to the alternative liability of the principal and the agent.

Hutcheson
v. Eaton,
13 Q. B. D.
861.

Thomson v.
Davenport,
9 B. & C. 78.

[*350] *Even where the agent is distinctly described to be such, the usage of a trade, as in *Fleet v. Murton*,

Excep-
tions.

L. R. 7 Q. B.
126.

¹ *Johnson v. Armstrong*, 83 Tex. 325. Cf. *Byington v. Simpson*, *supra*.

Armstrong
v. Stokes,
L. R. 7 Q. B.
605.

may make him liable: so too may the general rule that an agent acting for a foreign principal has no authority to pledge his credit.

Where a man has under these circumstances contracted as agent, he may declare himself to be the real principal. The other party to the contract does no doubt lose the alternative liability of the agent or the unnamed principal. Yet, if he was willing to take the liability of an unknown person, it is hard to suppose that the agent was the one man in the world with whom he was unwilling to contract; and at any rate the character or solvency of the unnamed principal could not have induced the contract.

16 Q. B. 655.

Thus in *Schmaltz v. Avery*, Schmaltz sued on a contract of charter-party into which he had entered 'on behalf of another party' with Avery. He had named no principal and it was held that he might repudiate the character of agent and adopt that of principal.

(ii) Where
principal's
existence
is undis-
closed.

Both
principal
and agent
liable.

Where the existence of the principal is undisclosed.

If the agent acts on behalf of a principal whose existence he does not disclose, the other contracting party is entitled to elect whether he will treat principal or agent as the party with whom he dealt. The reason of this rule is plain. If *A* enters into a contract with *X* he is entitled at all events to the liability of the party with whom he supposes himself to be contracting. If he subsequently discovers that *X* is in fact the representative of *M* he is entitled to choose whether he will accept the actual state of things, and sue *M* as principal, or whether he will

13 Q. B. D.
635.

a Barrow v. Dyster is an instance of conflict between the terms of a contract and the custom of a trade. Hides were purchased through brokers who did not disclose the name of their principals. The selling brokers were to arbitrate in case of difference under the contract. Evidence of a custom of the hide trade which would make them personally liable, was rejected, as inconsistent with the arbitration clause, which would thus have made them judges in their own cause.

[*351] adhere to the supposed state of *things upon which he entered into the contract, and continue to treat *X* as the principal party to it.^a

I have stated the rule of evidence by which a man who has contracted as principal may be shown to be an agent. Where a contract is ostensibly made between *A* and *X*, *A* may prove that *X* is agent for *M* with a view of fixing *M* with the liabilities of the contract. But *X* cannot, by proving that *M* is his principal, escape the liabilities of a contract into which he induced *A* to enter under the supposition that he (*X*) was the real contracting party. Neither party may escape any liability which he assumed under the contract, but *A* may show that his rights are wider than they appeared.¹

Though the real principal is entitled to sue upon such a contract, *A* may set up as against him any defence which he might have used against the agent. Thus where a principal sells goods through a factor who has authority to effect sales in his own name: if he intervene and sue a purchaser for the price he may be met by any set-off which the purchaser may have against the factor in the course of his transactions with him.²

But the right of the other contracting party to sue agent or principal—to avail himself of an alternative liability—may, in various ways, be so determined, that he is limited to one of the two and has no longer the choice of either liability.

(a) The agent may contract in such terms that the idea of agency is incompatible with the construction of the contract.³

^a If the other party elect to treat the agent *as agent* the principal will be bound by all acts which fall within the authority usually conferred upon an agent of the character in question. He cannot set up any instructions limiting the ostensible character of the agency.

supra, p. 268.

Higgins v. Senior, 8 M. & W. 884.

Trueman v. Loder, 11 Ad. & E. 589.

Defence against agent available against principal.

Borries v. Imperial Ottoman Bank, L. R. 9 C. P. 88.

Alternative liability, how concluded.

Watteau v. Fenwick, [1892] 1 Q. B. 846. *supra*, p. 848.

¹ *Byington v. Simpson*, 134 Mass. 169.

² *Taintor v. Prendergast*, 3 Hill (N. Y.), 72.

³ *Winchester v. Howard*, 97 Mass. 303.

Humble v.
Hunter,
12 Q. B. 810.

Thus where an agent in making a charter-party described himself therein as owner of the ship it was held that he could not be regarded as agent, that his principal could not intervene, nor could, by parity of reasoning, be sued.

*(b) If the other party to the contract after having discovered the existence of the undisclosed principal do anything which unequivocally indicates the adoption of either principal or agent as the party liable to him, his election is determined and he cannot afterwards sue the other.¹ [*352]

Per Lord
Cairns,
Hamilton v.
Kendall,
4 App. Ca.
514.

So too if, before he ascertain the fact of agency, he sue the agent and obtain judgment, he cannot afterwards recover against the principal.² Merely to bring an action under these circumstances would not determine his rights. 'For it may be that an action against one might be discontinued and fresh proceedings be well taken against the other.'³

Priestly v.
Fernie,
8 H. & C.
984.

(c) Again, if, while exclusive credit is given to the agent, the undisclosed principal pays the agent for the price of goods sold to him, he cannot be sued when he is discovered to be the purchaser. If *A* buys goods from *X* on behalf of *M* whose existence he does not disclose, and *M* before he is known to be principal pays the price to *A*, *M* cannot be sued by *X*.⁴

Armstrong
v. Stokes,
L. R. 7 Q. B.
598.

The position of the parties is clearly different to that which they occupy where the existence of a principal is known, though his name is not disclosed. There the other contracting party presumably looks beyond the agent to the credit of the principal. 'The essence of such a

¹ *Kingsiey v. Davis*, 104 Mass. 178.

² *Contra: Beymer v. Bonsall*, 79 Pa. St. 298; *Maple v. R. Co.*, 40 Oh. St. 313.

³ *Cobb v. Knapp*, 71 N. Y. 348.

⁴ *Fradley v. Hyland*, 37 Fed. Rep. 49; *Thomas v. Atkinson*, 38 Ind. 248.

transaction,' said Bowen, J., in *Irvine v. Watson*, 'is that the seller as an ultimate resource looks to the credit of some one to pay him if the agent does not.' If therefore the principal settles accounts with his agent before the ordinary period of credit has expired the seller would be deprived of the liability to which he was induced to look when he entered into the contract.¹

5 Q. B. D.
107.
(C. A.) 414.

IV. LIABILITY OF PRINCIPAL FOR FRAUD OF AGENT.

(4) Fraud
of agent

A principal is liable to an action for deceit for the fraud of his agent, if the fraud was committed in the ordinary course of his employment. The liability of

within
scope em-
ployment;

[*353] the principal is in *no wise different from that of an employer who is responsible for wrongful acts done by those in his service, within the scope of their employment. A man is equally liable for the negligence of his coachman who runs over a foot passenger in driving his master's carriage from the house to the stables, and for the fraud of his agent who, being instructed to obtain a purchaser for certain goods, obtains one by false statements as to the quality of the goods.²

Barwick v.
English
Joint Stock
Bank,
L. R. 2 Ex.
259.

But if the person employed act beyond the scope of his employment he no longer represents his employer to make him liable in tort or contract. An agent was employed to sell a log of mahogany; he was not authorized to warrant its soundness, but he did so knowing it to be unsound. Barons Bramwell and Martin held that the employer was not liable for deceit: nor could the contract be avoided, because the parties could no longer be replaced in their previous positions, for the log had been sawn up and partly used.

beyond
scope of
employ-
ment.

Udell v.
Atherton,
7 H. & N.
172.

¹ See Huffcut on Agency, § 125.

² *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518; *Peebles v. Patapsco Guano Co.*, 77 N. C. 233; *Haskell v. Starbird*, 152 Mass. 117; *New York &c. R. v. Schuyler*, 34 N. Y. 39.

The rights of the parties may be thus stated.

Liability *ex delicto*; If the agent commits a fraud in the course of his employment, he is liable, and so is his principal.

If he commits a fraud outside the scope of his authority he would be liable, but not his principal.

ex contractu. In the first case the other party might sue upon the contract, and in either case he would be entitled to avoid the contract upon the conditions described on page 176.

Where a principal allows his agent to make a statement which he knows, but which the agent does not know, to be false, it would seem difficult to sue either principal or agent for deceit; for the one did not make the statement, and the other honestly believed it to be true. But the contract could be set aside or resisted on the ground of material misrepresentation if not on the ground of fraud: and it would be strange if the consequences of fraud did not attach to a principal who knowingly employed an ignorant agent in order to profit by his misrepresentations.

National
Exchange
Co. of Glas-
gow v.
Drew,
2 Macq,
H. L. C. 146.

Liability
for non-
disclosure.

In the case of a contract *uberrimae fidei*, the principal *would seem to be liable to have his contract invalidated if his agent conceals a material fact. It is [*354] said that 'the knowledge of the agent is the knowledge of the principal,' and this doctrine has been carried so far that, in the Court of Appeal, a principal was held to be unable to recover on a policy of insurance because an agent whom he had employed, *but who had not effected the insurance*, knew of facts, materially affecting the risk, which he did not communicate to his employer, and of which the employer was unaware. The House of Lords overruled this decision.

Blackburn v.
Vigors,
17 Q. B. D.
(C. A.) 558.

12 App. Ca.
581.

The agent is employed to represent the principal for one or more transactions with more or less discretionary power. What he does in the course of the transaction is the act of his principal; what he knows and does not tell is — if he ought to tell it and if the transaction is carried out — a non-disclosure which would affect his principal's

rights. But he represents his principal *for the purpose of the transaction* in question, and if, before it is effected, his authority is revoked, the relation of employer and employed ceases to exist.

In fact the knowledge of the agent is the knowledge of the principal when, and only when, it is imparted to the principal, or the transaction to which the knowledge is material is carried out.¹ Hence it follows that if the agent knows that the principal is being defrauded, the principal cannot set aside the contract on the ground of fraud.

When
knowl-
edge of
agent is
knowl-
edge of
principal.

An agent of an insurance company obtained a proposal for insurance from a one-eyed man who, being also illiterate, signed at the request of the agent a form stating among other things that he was free from any physical infirmity. The agent knew that the insured had but one eye. The insurance was against partial or total disablement; after a while, the insured lost his second eye, and claimed the amount due under the policy for a total disablement. The company resisted the claim, on the ground of the falsehood contained in the proposal; but it was held that the knowledge of the agent was their knowledge and that they were liable.

Bawden v.
London &
T. Assur-
ance Co.,
[1892]
2 Q. B. 534.

¹ See *Constant v. University of Rochester*, 111 N. Y. 604; *Trentor v. Pothen*, 46 Minn. 298.

CHAPTER III.

Determination of Agent's Authority.

AN agent's authority may be determined in any one of three ways : by agreement ; by change of status ; or by death.

(i) *Agreement.*

(1) **Agreement.**

The relation of principal and agent is founded on mutual consent, and may be brought to a close by the same process which originated it, the agreement of the parties.

Where this agreement is expressed by both parties, or where, at the time the authority was given, its duration was fixed, the matter is obvious and needs no discussion.

Revoca-
tion a
condition
subse-
quent.

Where authority is determined by revocation it must be borne in mind that the right of either party to bring the relation to an end by notice given to the other is a term in the original contract of employment.

Limits of
right to
revoke.

But the principal's right to revoke is affected by the interests (1) of third parties, (2) of the agent.

Rights of
third
parties.

(1) A principal may not privately limit or revoke an authority which he has allowed his agent publicly to assume. He will be bound by the acts of the agent which he has given other persons reason to suppose are done by his authority.

5 Q. B. D.
894.
6 App. Ca.
24.

The case of *Debenham v. Mellon* is a good illustration of the nature and limits of this right of revocation.

Illustra-
tion from
case of

A husband who supplied his wife with such things as might be considered necessities for her forbade her to

[*356] pledge *his credit; any authority she might ever husband and wife.
have enjoyed for that purpose was thereby deter-
mined. She dealt with a tradesman who had not before
supplied her with goods on her husband's credit and had
no notice of his refusal to authorize her dealings. He
supplied these goods on the husband's credit and sued
him for their price. It was held that the husband was
not liable, and the following rules were laid down in the
judgments given.

(a) Marriage does not of itself create by implication an authority from the husband to the wife to pledge the husband's credit; except in such cases of necessity as we have described above.

Marriage no authority.

supra, p. 334.

The wife therefore can only be constituted her husband's agent by express authority or by such conduct on his part as would *estop* him from denying the agency.

(b) Where the husband has habitually ratified the acts of his wife in pledging his credit, he cannot, as regards those whom he has thus induced to look to him for payment, revoke her authority without notice.

But may raise a presumption from conduct.

'If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demur in respect of such dealings, the tradesman has a right to assume, *in the absence of notice to the contrary*, that the authority of the wife which the husband has recognized continues. The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume.'

5 Q. B. D. 403.

(c) In the absence of such authority arising from conduct the husband is entitled as against persons dealing with his wife to revoke any express or implied authority which he may have given her, and to do so without notice to persons so dealing.

Otherwise wife's authority revocable without notice.

'The tradesman must be taken to know the law; he knows that the wife has no authority in fact or in law to pledge the husband's credit even for necessities, unless he expressly or impliedly gives it her, and that what the husband gives he may take away.'

Per The-siger, L.J., 5 Q. B. D. 403.

The case of husband and wife is perhaps the best, as it *is the strongest, illustration of the limits within which the principal may revoke an authority con- [*357] sistently with the rights of third parties.¹

Rights of
agent.

(2) If the employment is in its nature such that the authority cannot be revoked without loss to the agent, the principal may not revoke.

This rule has recently been treated as identical with a rule of a more limited significance, that 'an authority coupled with an interest is irrevocable.'

What is an
interest?

Authorities given to an agent to pay to a third party a debt which he owes to his principal, or to sell lands and pay himself a debt due to him out of the proceeds, are instances in which an authority has been held to be irrevocable by reason of interest. The 'result appears to be,' said Wilde, C.J., in *Smart v. Sandars*, 'that where an agreement is entered into on sufficient consideration, whereby an authority is given for the purpose of conferring some benefit on the donee of that authority, such an authority is irrevocable. That is what is usually meant by an authority coupled with an interest.'²

5 C. B. 917.

ibid. 895.

It may be well to compare the rule in *Smart v. Sandars* with the wider rule which I have laid down above.

In *Smart v. Sandars* a factor who had made advances on account of his principal sold goods of the latter, contrary to his orders, in order to repay himself. He alleged that he was given in the first instance authority to sell; that he had an interest in the proceeds, arising from the advances; and so, an irrevocable authority. It was held that he had no such authority.

¹ Notice of revocation is necessary to protect third parties. *Claflin v. Lenheim*, 66 N. Y. 301. But if the agency be for a single act, notice is unnecessary after the performance of that act. *Watts v. Kavanagh*, 35 Vt. 34.

² *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174.

In *Read v. Anderson* an agent made bets on account of his principal and paid the bets, contrary to orders, to avoid being noted as a defaulter at Tattersall's. He alleged an authority to make and pay bets; an interest arising from his liability incurred at Tattersall's; and so, an irrevocable authority.

[*358] *Hawkins, J., held that the liability incurred was an 'interest' which made the authority irrevocable. The Court of Appeal upheld his decision, but not on this ground.

10 Q. B. D.
100.

One may put the decisions in this way. If in *Smart v. Sandars* the principal had said to the factor to whom he was in debt, 'sell the goods when an opportunity offers and repay yourself out of the proceeds,' this would answer to the description of an 'authority coupled with an interest' and would be irrevocable. It would in fact be a special contract between employer and employed as to the mode of satisfying a debt; and this I believe to be the real meaning of a phrase to which some mysterious significance has been supposed to attach.

18 Q. B. D.
779.

As the case stood in *Smart v. Sandars* the fact that the principal owed money to his factor did not prevent him from revoking an authority which had not been given in connexion with the debt. The creditor had no right to help himself, contrary to his orders, out of his debtor's property, even though he had once been employed to sell that property.

In *Read v. Anderson* the agent had been employed to make a contract; the employer endeavoured to revoke his authority, not to make similar contracts in the future, but to perform a contract already made, the non-performance of which would have exposed the agent to loss in his business.

18 Q. B. D.
779.

The Gaming Act of 1892 has made it impossible for such an action to be maintained henceforth by one who is employed to make bets; but the principle of *Read v. Anderson* still holds good as expressed by Bowen, L.J.

‘There is a contract of employment between the principal and the agent which expressly or by implication regulates their relations; and if as part of this contract the principal has expressly or impliedly bargained not to revoke the authority and to indemnify the agent for acting in the ordinary course of his trade and business he cannot be allowed to break his contract.’¹

ibid. 782.

(2) Change
of status.

*(ii) *Change of status.*

[*359]

Bank-
ruptcy.

Bankruptcy of the principal determines, and before 1883 marriage of the principal, if a woman, determined, an authority given while the principal was solvent, or sole.

Minett v.
Forester,
4 Taunt. 541.
Charnley v.
Winstanley,
5 East, 266.

It is still open to question whether insanity annuls an authority properly created while the principal was yet sane. The latest case on this point is *Drew v. Nunn*. The defendant there, being at the time sane, gave an authority to his wife to deal with the plaintiff; he then became insane; the wife continued to deal with the plaintiff and gave no notice of the insanity of her husband; the defendant recovered and resisted payment for goods supplied to his wife while he was insane.

4 Q. B. D.
661.

Insanity.

The court did not expressly decide how insanity affected the continuance of an authority, but held that ‘the defendant by holding out his wife as agent, entered into a contract with the plaintiff that she had authority to act on his behalf, and that until the plaintiff had notice that this authority was revoked he was entitled to act upon the defendant’s representations.’ Since the decision in the *Imperial Loan Co. v. Stone* it might be said that one who contracts is entitled to assume that the other party is sane, unless the contrary should appear, nor would he be expected when dealing with an agent to inquire whether the principal was of sound mind.²

[1892]
1 Q. B. 599.

¹ If the agent is intrusted with funds for a creditor of the principal, and has promised the creditor to pay, the agency is irrevocable, since the agent becomes liable to the creditor. *Goodwin v. Bowden*, 54 Me. 424.

² See *Davis v. Lane*, 10 N. H. 156; *Matthiessen &c. Co. v. McMahon*, 38 N. J. L. 536.

Knowledge of the defendant's insanity would probably have disentitled the plaintiff to rely on the authority of the wife; for the decision in his favour rested mainly on the ground that the authority had been made known to him, but not the insanity which might have annulled it. In fact the defendant seems to have been held liable rather on the ground of his own representations than on the agency of his wife. It is possible that, since 1883, the wife who knowing that her husband was insane continued to exercise an authority once given by him, might be sued on the so-called warranty of authority.

ante, p. 347.

[*360] *(iii) *Death of principal.*

The death of the principal determines at once the authority of the agent,^a leaving the third party without a remedy upon contracts entered into by the agent when ignorant of the death of his principal. The agent is not personally liable, as in *Kelner v. Baxter*, as having contracted on behalf of a non-existent principal; for the agent had once received an authority to contract. Nor is he liable on a warranty of authority as in *Collen v. Wright*; for he had no means of knowing that his authority had determined. Nor is the estate of the deceased liable; for the authority was given for the purpose of representing the principal and not his estate. The case seems a hard one, but so the law stands at present.¹ It would appear probable however, from some expressions of Brett, L.J., in *Drew v. Nunn*, that the Court of Appeal might be disposed to attach liability to the estate of the deceased principal, should the question again arise.

(3) **Death.**

Smout v. Ilbery,
10 M. & W. 1.

L. R. 2 C. P.
174.

8 E. & B.
647.

Blades v. Free,
9 B. & C.
167.

4 Q. B. D.
661.

^a This statement should be qualified in respect of powers of attorney expressed to be irrevocable under sections 8 and 9 of the Conveyancing Act of 1882. See 44 & 45 Vict. c. 41. § 47, and 45 & 46 Vict. c. 39. §§ 8, 9. But these exceptions are of a very limited character and do not affect the principle laid down in the text.

¹ *Farmers' &c. Co. v. Wilson*, 139 N. Y. 284; *Long v. Thayer*, 150 U. S. 520.

CONTRACT AND QUASI CONTRACT.

It is necessary to touch on some forms of obligation, called quasi contract for want of a better name, because they acquired, for purposes of pleading, the form of agreement.¹

In early notions of contract, whether in Roman^a or in English law, we must not look for an analysis of agreement, as emanating from offer and acceptance. The fact that one man had benefited at the expense of another under circumstances which called for a readjustment of rights might give rise to the action of debt. And this was the remedy, not only for breaches of contract based on executed consideration where such breach resulted in an ascertained money claim, but for any case where statute, common law, or custom laid a duty upon one to pay an ascertained sum to another.

Assump-
sit.

The action of assumpsit, on the other hand, was primarily an action to recover an unliquidated sum, or such damages as the breach of a promise had occasioned to the promisee.

Blackstone,
Comm. iii.
341.

But there were certain inconveniences attaching to the action of debt. The defendant might 'wage his law,' and

Gaius, 3.
§ 91.

^a Thus Gaius, after illustrating the nature of the contract *Re*, by the instance of *Mutuum* or loan for consumption, goes on to say, 'is qui non debitum accepit ab eo qui per errorem solvit, *re obligatur*.' By the time of Justinian this legal relation had been definitely assigned to the province of quasi contract. *Institutes*, iii. 27. 6.

¹ For a discussion of the difference between a true contract resting on assent and a fictional contract created by law, see *Hertzog v. Hertzog*, 29 Pa. St. 465, H. & W. 1; *Dusenbury v. Speir*, 77 N. Y. 144; Keener on Quasi-Contracts, Ch. I.

the action was then determined, not upon the merits, but by a process of compurgation, in which the defendant came into court and declared upon oath that he did not owe the debt, and eleven respectable neighbours also declared upon oath that they believed him to speak the truth. Wager of law.

Again, the technical rules of pleading forbade the inclusion in the same suit of an action of debt and an action of *assumpsit*, an action for liquidated and one for [*362] unliquidated damages; for the one was based upon contract real or feigned, the other upon a form of wrong, the *non-feasance* of an undertaking.

Assumpsit therefore was preferred to *debt* as a form of action, and, after a while, by the pleader's art, a money debt was stated in the form of an *assumpsit*, or undertaking to pay it. First it was decided in *Slade's case* that an action might be maintained in *assumpsit*, though the contract was a bargain for goods to be sold, resulting in a liquidated claim or *debt*. Then where the breach of a contract resulted in such a claim the plaintiff was enabled to declare in the form of a short statement of a debt, based upon a request by the defendant for work to be done or goods to be supplied, and a promise to pay for them. This was settled in the last twenty-five years of the seventeenth century. Thenceforth a man might state claims arising from contract variously in the same suit — as a special agreement which had been broken — and as a debt arising from agreement and hence importing a promise to pay it.

4 Co. Rep. 92.

Indebitatus counts.

See expressions of Holt, C.J., quoted in *Hayes v. Warren*, 2 Str. 982.

Such a mode of pleading was called an *indebitatus* count, or count *indebitatus assumpsit*; the remedy upon a special contract which resulted in a liquidated claim was now capable of being stated as a debt with the addition of a promise to pay it. In this form it was applied to the kinds of liability which, though devoid of the element of agreement, gave rise to the action of debt, and thence to all cases where *A* was liable to make good to *X* a sum gained at *X*'s expense.

Moses v. Macferlan, 2 Burr. 1005.

Thus for the convenience of the remedy certain liabilities have been made to figure as though they sprang from contract, and have appropriated the form of agreement. The distinction between assumpsit and debt was practically abolished by the Common Law Procedure Act (1852). The plaintiff was no longer required to specify the form in which his action was brought; he was allowed to join various forms of action in the same suit, and might omit the feigned promise from the statement of the cause of action. The form of pleading, in such cases as resolved themselves into *a simple money claim, was reduced to a short statement of a debt due for money paid or received; [*363] and now the Judicature Act has abolished former pleadings, and has substituted for the *indebitatus* counts a simple indorsement upon the writ of summons.

In deference to their historical connexion with contract, I will notice legal relations which once, in the pleader's hands, wore the semblance of offer and acceptance.¹

Such relations may arise from the judgment of a court of competent jurisdiction, or from the acts of the parties.

Judgment. As to the former, it is enough to say that the judgment of a court of competent jurisdiction, ordering a sum of money to be paid by one of two parties to another, is not merely enforceable by the process of the court, but can

¹ In the admirable treatise by Professor Keener on Quasi-Contracts, the author divides quasi-contracts into three groups: (1) those founded upon a record, as a judgment; (2) those founded upon a statutory, official, or customary duty, as the obligation to pay for a statutory service, like compulsory pilotage, the obligation of a sheriff, or the obligation of a common carrier or innkeeper; (3) those founded upon the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another, as the obligation of an infant or lunatic to pay for necessities, the obligation of a person to refund money paid under mistake or duress, the obligation of a person to pay for benefits conferred under a contract which through no fault of the plaintiff is incapable of full performance, the obligation of indemnity or contribution, and so on. Ch. I.

be sued upon as creating a debt between the parties, whether or no the court be a court of record.¹

Williams v. Jones, 18 M. & W. 628.

The acts of the parties may bring about this obligation either (1) from the admission by *A* of a claim due to *X* upon an account stated, or (2) from the payment by *A* of a sum which *X* ought to have paid, or (3) from the acquisition by *A* of money which should belong to *X*.

Acts of parties.

(1) An account stated is an admission by one who is in account with another that there is a balance due from him. Such an admission imports a promise to pay upon request, and creates an actionable liability *ex contractu*.²

Account stated.

(2) It is a rule of English law that no man 'can make himself the creditor of another by paying that other's debt against his will or without his consent.'

Irving v. Veitch, 3 M. & W. 106.
Hopkins v. Logan, 5 M. & W. 241.
Per Willes, J., in Johnson v. Royal Mail Steam Packet Co., L. R. 3 C. P. 43.

But if *A* requests or allows *X* to take up a position in which he is compelled by law to discharge *A*'s legal liabilities, the law imports a request and promise made by *A* to *X*, a request to make the payment, and a promise to repay.

Money paid by *A* for the use of *X*.

If one of several co-debtors pays the entirety of the debt he may recover from each of the others his proportionate share. In such a case a request to pay and a promise to repay were feigned in order to bring plaintiff within the [*364] *remedy of *assumpsit*, and he could recover his payment from his co-debtors as money paid to their use.³

Kemp v. Finden, 12 M. & W. 421.

A sub-tenant who pays the rent of his lessor to the

¹ A judgment is not a contract. *O'Brien v. Young*, 95 N. Y. 428, H. & W. 76; *Morley v. Lake Shore Ry.*, 146 U. S. 162.

² An account stated rests on assent, and is often in the nature of a compromise. *Dunham v. Griswold*, 100 N. Y. 224. If in parol it has no effect where the original claim is barred and the statute requires a written acknowledgment to revive it. *Hoyt v. Wilkinson*, 10 Pick. (Mass.) 31. The assent may be implied. *Leather Mfrs. Bk. v. Morgan*, 117 U. S. 96.

³ Contribution and indemnity are not founded upon contract. *Tobias v. Rogers*, 13 N. Y. 59; *Bailey v. Bussing*, 28 Conn. 455.

Jones v.
Morris,
3 Exch. 742.

superior landlord under a threat of distress to his goods,^a may recover the amount so paid or deduct it from his rent; and a man who in the course of business leaves his goods on the other's premises and has to pay the other's debt to prevent distraint of his goods may in like manner recover his money.¹

Exall v.
Partridge,
3 T. R. 398.

We might multiply instances of this kind of liability, but we must not forget that legal liability incurred by *X* on behalf of *A* without any concurrence or privity on the part of *A*, will not entitle *X* to recover for money which under such circumstances he may pay to *A*'s use. The liability must have been in some manner cast upon *X* by *A*. Otherwise the mere fact that *X* has paid under compulsion of law what *A* might have been compelled to pay, will give to *X* no right of action against *A*. *X* may have been acting for his own benefit and not by reason of any request or act of *A*.²

England v.
Marsden,
L. R. 1 C. P.
529.

Money
received
by *X* for
the use
of *A*.

(3) There are many cases in which *A* may be required to repay to *X* money which has come into his possession under circumstances which disentitle him to retain it.

Moses v.
Macferlan,
2 Burr. 1010.

This class of cases, though at one time in the hands of Lord Mansfield it threatened to expand into the vagueness of 'moral obligation,' is practically reducible to two groups of circumstances now pretty clearly defined.

The first of these are cases of money obtained by wrong, such as payments under contracts induced by fraud, or duress;³ the second are cases of money paid under such

^a The goods of a lodger are protected from distress by the Lodger Protection Act, 34 & 35 Vict. c. 79.

¹ *Wells v. Porter*, 7 Wend. (N. Y.) 119.

² See criticism of *England v. Marsden* in Keener, Quasi-Contracts, pp. 390-395.

³ *Carew v. Rutherford*, 106 Mass. 1; *Swift Co. v. United States*, 111 U. S. 22; *Cook v. Chicago R.*, 81 Iowa, 551; *Duval v. Wellman*, 124 N. Y. 156, H. & W. 402.

mistake of fact as creates a belief that a legal liability rests on the payer to make the payment.^{b1} Such cases lie outside the limits of our subject.

Marriot v. Hampton, 2 Sm. L. C. 441 (9th ed.), and notes thereto.

^b The liability to repay money paid for a consideration which has wholly failed is sometimes classed among the foregoing obligations, but is based upon genuine contract, though shortly stated in the form of an *indebitatus* count.

¹ *Appleton Bank v. McGilvray*, 4 Gray (Mass.), 518; *Mayer v. New York*, 63 N. Y. 455; *Wood v. Sheldon*, 42 N. J. L. 421; *McGoren v. Avery*, 37 Mich. 120.

FORM OF CHARTER-PARTY.

Charter-Party,

18

IT IS THIS DAY MUTUALLY AGREED, between

of the Good Ship or Vessel called the
of the measurement of

Tons Register, or thereabouts, and

Merchant,

that the said ship being tight, staunch, and strong, and in every way fitted for the Voyage, shall with all convenient speed, sail and proceed to

or as near thereunto as she may safely get, and there load from the factors of the said Merchant a full and complete cargo

which is to be brought to and taken from alongside at Merchant's Risk and Expense, and not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to

or as near thereunto as she may safely get, and deliver the same on being paid freight.

Restraint of Princes and Rulers, the Act of God, the Queen's Enemies, Fire, and all and every other Dangers and Accidents of the Seas, Rivers, and Navigation of whatever Nature and Kind soever, during the said Voyage, always excepted.

Freight to be paid on the right delivery of the cargo.

days to be allowed the said Merchant (if the Ship be not sooner despatched), for

and days on Demurrage^a over and above the said laying days at £ per day.

Penalty for non-performance of this agreement, estimated amount of freight.

Witness to the signature of }

Witness to the signature of }

^a It is usual to fix a certain number of days, called the '*lay days*,' for the loading and unloading of the ship. Beyond these the merchant may be allowed to detain the ship, if need be, on payment of a fixed sum *per diem*. The detention and the payment are called *Demurrage*.

FORM OF POLICY OF MARINE INSURANCE.¹

S. G.

Be it known that

£

as well in own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain in part or in all, doth make assurance, and cause and them and every of them, to be insured, lost or not lost, at and from

upon any kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the

whereof is Master, under God, for this present voyage, or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same Ship, or the Master thereof is or shall be named or called, beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said Ship upon the said Ship, &c.

and shall so continue and endure, during her Abode there, upon the said Ship, &c.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises whatsoever, shall be arrived at

upon the said Ship, &c., until she hath moored at Anchor Twenty-four Hours in good Safety, and upon the Goods and Merchandises, until the same be there discharged and safely landed; and it shall be lawful for the said Ship, &c., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured, by Agreement between the Assured and Assurers in this Policy, are and shall be valued at

Touching the Adventures and Perils which we the Assurers are contented to bear and to take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises and Ship, &c., or any Part thereof; and in case of any loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labour and travel for, in, and about the Defence, Safeguard and Recovery of the said Goods and Merchandises, and Ship, &c., or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his Sum herein assured. And it is agreed by us the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured at and after the Rate of

IN WITNESS whereof, we the Assurers have subscribed our Names and Sums assured in

N.B. — Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent.; unless general, or the Ship be stranded.

¹ See Richards on Insurance, p. 600.

FORM OF INLAND BILL OF EXCHANGE.

£100.				OXFORD, 1st <i>January</i> , 1891.
Three months after date	Accepted payable at the Old Bank, Oxford. Richard Roe.	pay	to Mr.	JOHN STYLES or order the
sum of one hundred pounds		for	value	received.
To RICHARD ROE, Esq.				

FORM OF PROMISSORY NOTE.

£100.	OXFORD, 25th <i>December</i> , 1890.
I promise to pay to RICHARD ROE or order at the Old Bank, Oxford, six months after date the sum of £100, for value received.	
	JOHN DOE.

INDEX.

REFERENCES ARE TO TOP PAGINGS.

- A.**
- Absolute promise:**
and concurrent condition, 361.
- Acceptance:** 13-49.
of offer of contract, 5, 13-24.
must be absolute and unconditional, 23.
its effect in concluding contract, 5, 28.
must be communicated, 5, 19-23.
in case of rewards, 19 n.
may be made by conduct, 17.
in contracts by correspondence, 25-32.
motive of acceptance immaterial, 43.
of bill of exchange
must be in writing, 68, 296.
consideration for, 90, 299.
- Accommodation bill:**
its character, 301.
- Accord and satisfaction:**
how constituted, 106, 383.
a form of discharge of right of action, 384.
accord without satisfaction, effect of, 336.
- Account stated:**
with infant, void, 134.
its general effect, 439.
- Acquiescence:**
how far equivalent to acceptance, 20.
in fraud, affirms contract, 211.
in breach of condition, 182, 373.
in act of agent, a ratification, 408, 431.
- Act of God:**
definition of, 340.
a condition subsequent, 340.
an excepted risk, when, 339.
- Action:**
of assumpsit, 53, 54, 436, 437.
of covenant, 52.
of debt, 52, 436, 437.
of detinue, 52.
of deceit, 176, 203, 215.
effect of bringing action, 387.
right of action, as a form of obligation, 9.
springs from breach of contract, 350, 374.
assignment of, 247, 289, 290.
how discharged, 382-389.
- Adequacy:**
of consideration, how regarded at common law, 90, 91.
in equity, 92.
- Admission:**
of written contract, how made, 316.
- Advertisement:**
offer made by, 25, 43, 44.
acceptance of by act, 112.
- Affirmation:**
right of in case of fraud, 216.
- Agency:** 400-435; *see* **Principal and agent**.
- Agent:**
who may be an agent, 402.
of necessity, 405.
appointment of sub-agent, 277 n.
for purposes of 29 Car. II. c. 3. § 4., 67, 70, 416.
of 9 Geo. IV. c. 14. § 1., 69, 388.
- Agreement:** 12-49, 156-224.
the origin of contract, 1, 8, 10.
analysis of, 2, 3.
definition of, 3.
a source of obligation, 8.
assignment of contract by, 287, 288.
discharge of contract by, 332-343.
forms needed for discharge by agreement, 342, 343.
determination of agency by, 430-434.
- Alien:**
his capacity to contract, 129.
alien enemy, contract with, 129, 242, 243.
- Alteration of instrument:**
when its effects discharge, 397.
- Ambiguity:**
latent and patent, 323.
- Apprenticeship:**
contracts of, 136.
- Arbitration:**
agreements to refer to, 245.
- Assignment:** 287-312.
a form of operation of contract, 274.
of liabilities, 287.
of rights—at common law, 245 n, 289, 290.
in equity, 291-294.
by statute, 294, 295.
of covenants affecting leasehold, 306, 380, 381.
affecting freehold, 308, 309.
of contract by marriage, 309.
of contracts of deceased, 310.
of bankrupt, 311.

Assumpsit:

- a form of trespass on the case, 53.
- its relation to action of debt, 350, 437.
- its application to rights *quasi ex contractu*, 438, 439.

Attestation:

- when necessary to validity of a deed, 316.

Auctioneer:

- his liabilities on advertisement, 44, 45.
- his position as a general agent, 416.

Authority: *see* **Agency.**

- warranty of, 370, 371, 420.
- general and special, 415.
- coupled with an interest, 432.

Average:

- general and particular, 444.

Avoidance:

- right of, an infant's contract, 131-140.
- in case of misrepresentation, 190.
- of non-disclosure, 192, 197.
- of fraud, 215, 216.

B.**Bailment:**

- may give rise to action of detinue, 52.
- nature of consideration for, 100.

Bankruptcy:

- its effect in assigning contract, 311.
- in discharging contract, 385.
- in determining authority, 434.
- constitutional limitations, 398 n.

Bankruptcy Act: *see* **Statute.****Barrister:**

- his professional status, 130.

Bill of exchange: 297-303.

- form of, 443.
- must be in writing, 68.
- consideration for it presumed, 90.
- how affected by want of consideration, 235, 264.
- by unlawfulness of consideration, 235, 263, 264, 299.
- discharge by waiver, 104, 105, 335, 383.
- negotiable by custom, 29.
- now by statute, 296.
- how drawn, accepted, and indorsed, 297, 298.

Bill of Exchange Act: *see* **Statute.****Bill of lading:** 303-305.

- consideration for its indorsement, 98.
- how far negotiable, 303, 304.
- effect of its assignment, 303-305.
- form of, 444.

Bond:

- nature of, 65.
- penalties in, 56, 329.
- conditions subsequent in, 339.

Breach of contract: 349 *et seq.* *see* **Condition, Warranty, Independent promise.**

- consideration for waiver of, 107, 108, 383.
- as a cause of action, 180, 181, 183, 349.
- as a form of discharge, 349 *et seq.*
- rights conferred by it, 350, 374.
- repentance after breach, 352 n.
- modes in which it may take place, 353.
- renunciation before performance, 353.
- if accepted as a discharge by the other party, 355.
- renunciation during performance, 357.
- duty to keep down damages, 357 n.

Breach of contract: (*ctd.*)

- impossibility created by one party, 356, 358.
- failure in performance; 359-374.
- by breach of concurrent condition, 361.
- by total failure of consideration, 361.
- by breach of vital condition, 361.
- remedies for breach, 374-382.

Broker:

- his rights and liabilities, 259, 417, 418, 423.

C.**Carrier:**

- his promise as to safety of goods, 340, 371.
- when an agent of necessity, 405.

Champertry:

- how it affects contract, 246, 247.

Chancery Division:

- remedies obtainable in, 64, 326, 378-382.

Charter-party:

- construction of, 180, 324, 366, 373.
- excepted risks in, 339.
- form of, 443.

Chose in action:

- doubtful meaning of term, 289.
- cannot be assigned at common law, 289.
- how far assignable in equity, 291.
- and by Statute, 294, 295.

Civil death:

- meaning of term, 149.

Cognovit actionem:

- nature of, 57.
- attestation necessary to its validity, 316.

Cohabitation:

- illicit, is null as a consideration, 248.
- does not necessarily create agency, 404.

Collateral promise: *see* **Warranty.****Commission agent:**

- his relation to his employer, 412, 418.

Company: 144-147.

- capacity of to contract, 144, 283.
- to ratify contracts made before its formation, 283, 407.
- to make negotiable instruments, 144, 301.
- to sue and be sued through an agent, 285.
- articles of association of, 283.
- memorandum of association of, 146, 283.

Composition with creditors: 107-108.

- consideration for, 107, 384.
- fraudulent preference, 240, 267.

Compromise of suit:

- as consideration for a promise, 99, 104, 144.

Concealment:

- how different from non-disclosure, 204.

Condition: *see* **Breach of contract.**

- condition subsequent, 339.
- concurrent, 363.
- suspensory, 360.
- precedent, 338.
- a statement or promise, 182, 183, 210.
- implied in sale of goods, 366, 367.
- how distinguished from warranty, 183 n., 369.
- when convertible with warranty, 372, 373.

Consideration: 88-127.

- its place in English Law of Contract, 15, 16.
- essential where contract is not under seal, 14, 52, 55, 63, 89, 334, 383.

Consideration: (*ctd.*)

definition of, 88.
 executed and executory, 15, 16, 93, 112, 402, 403.
 history of, 50-55.
 is different from motive, 93, 94.
 must move from promisee, 95, 279, 280-282 n.
 must not be past, 112, 114.
 adequacy of, 90.
 reality of, 92 *et seq.*
 in cases of forbearance to sue, 97, 98, 104, of discharge of existing liability, 102, 103, 109.
 of composition with creditors, 107, 108.
 of waiver, 333, 334.
 when it must appear in writing
 Stat. of Frauds, § 4., 73, 78, 79.
 Sale of Goods Act, § 4., 86.
 exceptions to necessity for
 alleged, 89, 93, 115, 126.
 real, revived promise, 123, 124, 387, 389.
 additional security, 127 n.
 gratuitous employment, 100, 402.
 negotiable instrument, 301, 335.
 failure of a discharge, 157, 363.
Construction: 327-331.
 of documents, rules as to, 315, 327.
Contract in writing: 67-88.
 when writing is required, 67-70. *See Statute.*
 the writing is only *evidence* of the contract, 75, 315, 316.
 how proved, 317, 318. *See Evidence.*
 rectification of, in equity, 172, 326.
 how discharged by agreement, 342.
Contract of record: 57-59. *See Judgment.*
 a form of obligation, 9-11.
 its forms and characteristics, 57, 58.
 is not a true contract, 58.
Contract under seal: 59-69.
 offer under seal irrevocable, 23, 34.
 mode of execution, 60.
 characteristics, 61-65, 316.
 when necessary, 66, 67.
 illegality of consideration for, 262, 263.
 when negotiable, 144, 296.
 how it is proved, 316.
 how discharged, 344.
 promise for benefit of third party, 281 n.
 agent being a party to it contracts personally, 420.
Conveyance:
 how different from contract, 4.
 a sale is a conveyance, 85.
 its place in history of contract, 44.
Convict:
 his incapacity to contract, 130.
Copyholder:
 liable, though an infant, to pay fine, 132.
Corporations: 144-147.
 their contracts must be under seal, 66.
 exceptions to general rule, 66, 67 n., 144 n.
 necessary limits to their power to contract, 144, 146.
 express limits, 145.
 negotiable instruments, made by, 144, 145 n., 301 n.
 promoters of, 198.

Correspondence:

contracts made by, 25-42.
Covenant:
 action of, 52, 53.
 assignment of
 as affecting leasehold rights, 306.
 as affecting freehold rights, 308.
Coverture: *see Marriage.*
Custom: *see Usage.*
 custom of merchants, as to negotiable instruments, 296, 299.
 as to bills of lading, 303.
 as to agent's liability where principal is unnamed, 423.
 of City of London as to contract of married women, 150.

D.

Damages: 375-378.
 rules relating to, 375-378.
 penalty and liquidated damages, 328, 329.
 interest by way of damages, 376.
 how different from indemnity, 200.
Death:
 causes lapse of offer, 32.
 its effect in assigning contract, 310.
 in determining authority of agent, 435.
 civil death, in what it consists, 149.
Debt:
 action of, 52.
 why supplanted by action of assumpsit, 436, 437.
 assignment of, 287, 288.
Deceit: *see Fraud.*
 action of, 174, 203.
Deed: *see Contract under seal.*
Del credere agent:
 liabilities to his employer, 419.
Delivery:
 of deed, 60, 61.
 of negotiable instruments transferable by delivery, 296.
 of goods, a form of tender, 347.
Demurrage:
 for detention of ships, 443 n.
Detinue:
 action of, 52.
Discharge: 332-399; *see Agreement, Breach, Impossibility, Operation of law, Performance.*
Disclosure:
 duty of, in certain contracts, 169, 192.
 by agent, 354.
Divisible contract: 368-374.
 where consideration partly void, 254, 361.
 where performance incomplete, 363, 369.
Divorce:
 agreements for, illegal, 249 n.
 makes woman a feme sole, 150.
Drunken person:
 his contract voidable at his option, 147.
Duress: 218-219.
 to person, 218.
 to goods, 218, 219.
Duty:
 as distinct from obligation, 6.
 may be imposed by contract, 277, 278.

E.**Election :**

to keep contract alive, 352 n.

Equity :

how different from common law in treatment —

of gratuitous promise under seal, 63.

of inadequate consideration, 90.

of bonds and penalties, 65, 269.

of misrepresentation, 186, 187.

of fraud and influence, 209, 219.

of assignment of rights, 291, 292.

of construction of time clauses, 329.

its peculiar remedies, 64, 326, 381.

when obtainable only in Chancery Division, 64, 326, 381.

Escrow :

a deed delivered under condition, 61.

evidence that deed is an escrow, 315, 318.

Estate :

of deceased debtor, 62.

of bankrupt, 311.

ratification of contract made on behalf of, 405.

Estoppel :

by statements made in a deed, 61.

by words or conduct, 201, 202, 404.

the effect of, 201, 202.

by judgment, 385.

agency created by, 404-406.

Evidence : 314-326.

parol, inadmissible to prove contract

under 29 Car. II. c. 3. § 4., 68, 82.

or to supplement its terms, 78.

or to connect documents, 77, 78, 317.

exception as to part performance, 77, 78.

when admissible, 314.

extrinsic — to prove document, 316.

to prove or disprove agreement, 318.

secondary — of contents of document, 317.

of condition suspensory, 318.

of supplementary terms, 320.

explanatory of latent ambiguity, 323.

of usage, 324.

for purpose of equitable remedies, 326.

Executed consideration :

contracts arising from, 15, 16, 112, 113.

promise implied from, 17, 114, 121.

Executed contract :

meaning of term, 16, 335.

Execution :

of a deed, 60.

upon judgment, 58, 385.

Executor :

his duties and liabilities, 70, 310.

his promise to answer damages out of his own estate, 70.

Expectant heir :

protected from undue influence, 221.

Express and implied contracts :

distinction lies in mode of proof, 17 n.

F.**Factor :**

his rights and liabilities, 417, 423, 424, 432, 433.

Failure of consideration :

a form of discharge, 366, 367.

confused with mistake, 157, 158, 165, 166.

with fraud, 212, 213.

Failure of consideration : (ctd.)

money paid for consideration which has failed is recoverable, 441 n.

Forbearance :

of a right as consideration for a promise, 97, 98, 104, 105.

Foreign principal :

liability of agent for, 420, 424.

Foreign state :

non-liability of its sovereign, 129, 387.

or his representatives, 129, 387.

agreements hostile to, 242, 243.

its bonds negotiable, 296.

Form : 50-67.

its importance in legal history, 50, 51.

contracts valid by reason of, 56-61.

when merely evidentiary, 70.

of agreement for discharge, 342.

Fraud : 203-218.

a flaw in contract, 156.

also a civil wrong, 176, 240, 241.

definition of, 203.

consistent with honest motive, 176-178, 211.

with uncertainty of falsehood, 146, 179, 209.

but not with honest belief, 208, 209.

legal and equitable fraud, 187, 209.

representation an essential element, 206.

must be addressed to plaintiff, 213.

and must deceive him, 214.

its effects on contract, 215.

how different from undue influence, 219.

burden of proof lies on him who asserts fraud, 299.

affects limitation of actions, 387.

Frauds, Statute of, 67-88. See Statutes, Frauds, Sale of Goods Act.**Fraudulent preference :**

an illegal consideration, 240, 241.

money so paid, where recoverable, 268.

Fructus industriales :

not an interest in land under 29 Car. II. c. 3. § 4., 74.

G.**Gift :**

requires assent of donee, 4, 15.

when suggestive of undue influence, 219, 220.

Goods : see Sale.

what are, under 56 & 57 Vict. c. 71. § 4., 74, 83.

Gratuitous promise :

void unless made under seal, 15, 63, 64, 84.

never enforceable in Equity, 64, 220, 380.

Gratuitous undertakings :

when enforceable, 100.

Guarantee :

acceptance of, 27 n.

under 29 Car. II. c. 3. § 4., 71.

consideration for, need not appear in writing, 73.

uberrima fides, how far required, 192.

H.**Heir :**

liability of for debts of ancestor, 310.

expectant, contracts with, 221.

Husband and wife : see Marriage.

I.

Ignorance of law :

- its effect in case of mistake, 167.
- its effect in case of fraud, 207.

Illegality : 225-273.

- a flaw in contract, 225.
- by statute, 226.
- by rules of common law, 239-241.
- by rules of public policy, 241, 242.
 - contracts affecting foreign relations of State, 242.
 - injurious to public service, 243.
 - affecting course of justice, 245.
 - encouraging litigation, 246.
 - contrary to good morals, 248.
 - affecting marriage, 248.
 - in restraint of trade, 249.
- its effect on contract, 253-273.
- when parties are not *in pari delicto*, 267.
- when there is a *locus poenitentiae*, 268.

Immoral purpose :

- its effect upon contract, 248, 258.

Implied promise :

- arising from conduct, 17.
- of sea-worthiness in contract of marine insurance, 322, 323.
- of indemnity in contract of employment, 114, 117, 403, 409, 433.
- of quality in executory sale of goods, 366-369.
- of title, 372 n.
- of possibility, 372 n.
- of authority, 200, 372 n., 433.

Impossibility : 390-395.

- on face of the contract, 96, 390.
- antecedent, a form of mistake, 166, 390.
- created by act of one party, a form of breach, 356, 358.
- subsequent, when a discharge, 391-395.

Imprisonment :

- a form of duress, 218.

Inadequacy of consideration :

- how regarded in equity, 92, 222.

Indebitatus counts :

- their history, 437, 438.
- their object, 350, 351, 437.
- as applied to special contract, 351, 352.

Indemnity :

- distinct from guarantee, 71.
- from damages, 200.
- in marine and fire insurance, 238.

Indenture :

- as distinct from deed poll, 61.

Independent promises :

- what are independent promises, 362.
- absolute promises, 361-363.
- promises divisible in respect of performance, 363-369.
- subsidiary promises, 369.
- warranty a subsidiary promise, 371.

Indorsee :

- rights of, 264, 297, 301.
- where *bonâ fide* and for value, 299.

Indorsement :

- special, and in blank, 298.
- a form of security, 298.
- of bill of lading, 98, 303.

Infant : 131-144.

- his contract voidable at common law, 131.

Infant : (ctd.)

- when binding, 134, 135, 140.
- when void by Infants' Relief Act, 134.
- ratification at common law, 131.
- when implied, 132, 138, 139. [134.
- as affected by Lord Tenterden's Act, by Infants' Relief Act, § 2., 134.
- liabilities for necessities, 140, 141.
- for contract of service, 136.
- for wrong, 143.
- for breach of contract resulting in a wrong, 143.
- refused specific performance, 138.
- infancy affects limitation of action, 386.
- Injunction :** 380-382.
- when applicable, 380, 381.
- rules for granting it, 380.
- Insanity :** see Lunatic.
- Insurance :**

fire insurance

- how affected by non-disclosure of material fact, 192, 193.
- dealt with by 14 Geo. III. c. 48., 238.

life insurance

- disclosure of material fact required, 194, 195.
- is a form of wager, 231.
- how dealt with by 14 Geo. III. c. 48., 238.
- not a contract of indemnity, 238.
- policy of, assignable, 295.

marine insurance

- must be in the form of a policy, 68.
- form of, 445.
- disclosure of material fact required, 181, 192.
- but not by expression of opinion, 200.
- is a form of wager, 230, 237.
- need of insurable interest, 237.
- dealt with by 19 Geo. II. c. 37., 237.
- differs from life insurance, 237.
- policy of, assignable, 295.
- contains implied warranty of sea-worthiness, 322, 323.

Intention :

- distinctness of, necessary to agreement, 2.
- communication of, 3, 19, 20.
- statement of, as distinct from offer, 5, 44.
- representation of intention and of fact, 206.
- how it affects unlawful purpose, 260-262.
- of the parties to be gathered from construction of whole of contract, 325, 326, 370, 371.
- governs the construction of the contract, 185, 370, 371.

Interest :

- insurable, when requisite, 237, 238.
- on debt, when it may be given by way of damages, 375.
- interest coupled with authority, 432, 433.

J.

Judgment :

- a form of contract of record, 9.
- its nature and characteristics, 57, 58.
- foreign, 58 n.
- as a lien, 59 n.
- a discharge of right of action, 384.
- its operation by way of estoppel, 385.
- its operation by way of merger, 385.

Judgment: (ctd.)

how discharged, 384, 385.

creates a debt, 438, 439.

Judicature Act: see Statute.**L.****Land:**

interest in, under Stat. Frauds, § 4., 73.
uberrima fides in contract for sale of,
196.

assignment of obligations on transfer of
interest in, 306-309.

specific performance of contracts for sale
of, 379.

Lease:

assignment of, its effect on covenants,
306.

Legality: see Illegality, 225-273.**Letter:**

contracts by, 27-32.

Lex fori:

determines procedure, 81.

Lex loci:

determines validity of contract, 81.

License:

license to break contract, a bad plea, 334.

Lien:

of auctioneer, 416.

of factor, 417, 433.

Limitation of actions:

statutory, 386.

in case of specialty, 63, 386, 387.

of simple contract, 386.

barred debt a consideration for promise
to repay, 124.

disability to sue, effect of, 386, 387.

modes of reviving barred debt, 387, 388.

form of reviving such debt, 67, 388, 389.

Liquidated damages:

differ from penalty, 329, 330, 377.

Locus poenitentiae:

in case of illegal contracts, 268.

limitations of rule, 269-273, 433.

Loss of written instrument:

wherein it affects rights, 397, 398.

Lunatic: 147-149.

offer lapses by insanity, 32 n.

his executory contracts voidable, 147,
148.

not so, when executed in part, 147.

where so found by commission, invalid-
ity of contract is presumed, 148.

insanity affects limitation of actions, 386.

M.**Maintenance:**

what it is, 246, 247.

how it affects contract, 247.

Marriage:

a form of agreement differing from con-
tract, 4.

promise in consideration of, 73.

mutual promises to marry, 75 n., 92.

agreements affecting freedom of choice
in marriage, 248.

agreements for separation, 249.

effect of marriage on contract made by
wife *dum sola*, 309.

Married woman: 149-155.

her contract void at common law, 149.

common law exceptions, 149.

Married woman: (ctd.)

statutory exceptions, 150.

doctrine of separate estate, 150.

separate estate under Acts of 1882 and
1893, 151, 152.

under Act of 1893, 152-155.

can be agent for her husband

of necessity, 405.

by authority express or implied, 403,
431.

Master and servant:

liability for inducing servant to break
contract, 277-279.

contract terminable on notice, 341.

Merchants, Custom of:

as to foreign principal, 420.

as creating negotiability, 295, 302, 303.

Merger:

of lesser security in a greater, 57, 62.

a discharge of contract, 396.

a discharge of right of action arising
from contract, 384.

Misrepresentation: 174-203.

relates to formation of contract, 156, 174.

how different from fraud, 174, 176-179.

from non-disclosure, 176, 192.

how regarded at common law, 184-186.

in equity, 186, 209.

effect of Judicature Act, 188-191.

gives no right to damages, 200, 209.

exceptions, 177 n., 200.

of law, 207 n.

may give a right to indemnity, 200.

not actionable though negligent, 212.

Mistake: 157-174.

affects formation of contract, 157.

may be of intention or of expression, 157.

as to nature of transaction, 159-163.

as to party to contract, 163-165.

as to subject-matter of contract, 165,
166.

as to existence of thing contracted for,
166, 390, 391.

as to existence of a right, 167.

as to identity of subject-matter, 165, 166.

as to quality of subject of contract, 168,
171.

its effect upon contract, 167, 174, 271,
273.

confused with failure of consideration,
360, 361.

Money paid:

under mistake, recoverable, 172.

for an illegal object, when recoverable,
258, 262, 268.

to the use of another, when a cause of
action, 438-440.

Money received:

to the use of another, when a cause of
action, 440.

Moral obligation:

as consideration for a promise, 94, 126.

settled not to be so, 102, 103, 127.

Motive:

of acceptance, immaterial, 19, 43.

is no consideration for a promise, 93.

its effect in illegal contract, 257.

Mutual promises:

are consideration for one another, 92.

performance of one is no discharge,
344.

N.

- Necessaries:**
for an infant, 131, 140.
province of judge and jury in deciding what are necessities, 141, 142.
- Necessity:**
agent by, 405.
- Negligence:**
arising from mistake, 162.
in statement, not actionable, 211, 212.
of telegraph company, 208 n.
in selling dangerous articles, 213 n.
- Negotiable instrument:** *see* Bill of exchange.
presumptive consideration, 30 n.
when it can be made under seal, 144, 300.
of corporation, 65, 144.
as security for payment due on illegal or void contract, 235, 263, 295.
how distinct from assignable contract, 298.
negotiability by custom and statute, 295-305.
effect of giving as payment, 346.
consideration is presumed, 345, 346.
- Non-disclosure:**
contracts voidable on ground of, 192.
how different from fraud, 204.
by agent, 428.
- Notice:**
of acceptance of offer, 25, 26, 45, 46.
of assignment of contract, 292, 400.
of covenants binding land, 309.
- Nudum pactum:**
meaning of term in English law, 89.

O.

- Obligation:**
its definition, 6-10, 42.
distinguished from duty, 7, 277.
sources of, 8.
limits of, 275, 276.
- Offer:** 13-49.
must be communicated, 19-23.
must refer to legal relations, 22.
how far revocable, 25, 32-42.
how it may lapse, 32-34.
to unascertained persons, 42, 43.
- Offer and acceptance:**
a necessary element in agreement, 12, 19.
expressed in question and answer, 12.
its various forms, 14, 15, 405, 406.
- Office:**
sale of, 243.
- Operation of law:**
discharge of contract by, 396, 397.
- Opinion:**
statement of, not a representation, 191.
cannot amount to fraud, 206.

P.

- Par delictum:**
in cases of illegal contract, 266, 267.
- Parol:** *see* Evidence, Simple contract.
- Part performance:**
of contract under Statute of Frauds, 81-88.
- Parties:** *see* Assignment.
in contracts within 29 Car. II. c. 3. § 4., their names must appear in writing, 69, 70.

Parties: (*ctd.*)

- only parties to a contract are liable under it, 274-278.
who entitled at common law, 278-283.
who entitled in equity, 283-286.
third parties, when allowed to sue, 285.
with common interest, 285.
change of, a mode of discharge, 327-338.
- Partner:**
infant partner, his rights, 132, 133.
change of partners, its effects on contracts made with partnership, 338.
- Partnership:**
uberrimae fidei, how far a contract, 198.
general agency as between partners, 199, 404, 405.
- Patent ambiguity:**
may not be corrected by parol evidence, 323.
- Payment:**
of a smaller sum for a greater, 104.
a form of discharge, 344.
negotiable instrument as payment, 345.
- Penalty:**
rules of law and equity as to, 328.
penalty and liquidated damages, 330, 377.
- Pension:**
assignment of, 244.
- Performance:** *see* Payment, Tender.
postponement of, at request of one party, 336, 337.
discharge of one party by, 345.
discharge of contract by, 345.
- Personal contract:**
does not pass to representatives of deceased or bankrupt, 310, 311.
- Physician:**
his professional status, 130.
- Post:**
contracts by, 27-32.
- Principal and agent:** 400-435.
their relation a form of employment, 286, 400.
capacity of parties, 402.
authority how given, 403-408.
ratification of agent's act, 405-408.
duties of principal, 409.
of agent, 409-411.
special and general agency, 415.
commission agency, 418.
forms of professional agency, 416-419.
restriction of authority, 415, 430.
delegation of authority, 414.
revocation of authority, 430-435.
agent for named principal, 415-422.
when liable on contract, 420.
when liable otherwise, 420, 421.
for unnamed principal, 422-424.
for undisclosed principal, 424-427.
principal when liable for agent's fraud, 426, 427.
for agent's non-disclosure, 429.
effect of principal's change of status, or death, 434, 435.
- Promise:**
essential to contract, 5.
part executed, when a cause of action, 53.
to perform existing contract, 102.
for benefit of third party, 95, 279-286.

Promise: (*ctd.*)
 implied: *see* **Implied promise and Warranty**.
 under seal: *see* **Contract under seal**.
Promissory note:
 consideration for it presumed until the contrary is shown, 89, 299.
 negotiable by statute, 295, 296.
 rights of payee and indorsee, 298, 299.
Public policy:
 contracts in breach of it illegal, 224, 241.
 possible origin of rules respecting, 241.
 limits of its operation, 242.
 kinds of contract affected by it, 242-253.

Q.

Quantum meruit:
 when it may be sued upon, 351, 352.
Quasi-contract: 436-441.
 a source of obligation, 9, 120 n., 123 n., 140 n., 146 n., 148 n.
 assimilated to contract in pleading, 438-440.

R.

Railway company:
 nature of its offer to carry, 21, 44.
 how far liable on its time table, 44, 371.
 and for passenger's luggage, 371.
 tickets, 21-23.
Ratification:
 of infant's contract, 124, 138, 139.
 by suffering judgment, 139.
 of agent's act, rules respecting, 405-408.
Real estate:
 assignment of contracts respecting, 308.
Recognizance:
 a form of contract of record, 59.
Rectification:
 of written instrument, 158, 326.
Release:
 discharges right of action, 383.
Remedies:
 for breach of contract, 374-389.
 discharge of, 382-389.
 revival of, 124-127.
Renunciation of contract:
 before performance, 353-356.
 during performance, 357.
Representation:
 a statement in a contract, 179-182.
 or inducing a contract, 181.
 its effect at common law, 179-186.
 in equity, 186.
 of intention, 5, 44.
 of opinion, 184, 205.
 when actionable if false, 200, 208, 213.
 not actionable if negligent, 211.
 of principal by agent, 286, 402.
 of deceased by executor or administrator, 310, 311.
 of bankrupt by trustee, 311, 399.
Request:
 when it implies a promise, 115-119, 402.
Rescission: *see* **Agreement as a form of discharge**.
 right of, in case of misrepresentation, 190.
 in case of fraud, 219.

Restraint of trade: 249-253.
 must be reasonable, 64, 249, 250.
 rules respecting, 250-253.
Reversion:
 sale of, how regarded in equity, 221.
Revocation: 32-42.
 of proposal, when possible, 32, 34-42.
 notice of, 37-42.
 of acceptance, impossible in English law, 25-32.
 not so by Indian Contract Act, 32 n.
 of agent's authority, 430.
Rewards:
 offer and acceptance in, 19, 42-44.

S.

Sale: *see* **Statute, Sale of Goods Act**.
 of goods, 85.
 executed and executory, 16, 84, 85, 366-369.
 under Infants' Relief Act, 134.
 how affected by mistake as to party contracted with, 163, 217, 272.
 rule of *caveat emptor*, 170, 171.
 agreement for sale of land a contract *uberrima fides*, 196.
 specific performance of, 378, 379.
Sample:
 sale of goods by, 367.
Satisfaction: *see* **Accord**.
 payment of a smaller sum for a larger, 104-107.
 what satisfaction amounts to a discharge of right of action, 382.
Sea-worthiness:
 implied warranty of, in contract of marine insurance, 322, 323.
Seal: *see* **Contract under seal**.
 what constitutes, 60 n.
 of corporation, why necessary to its contracts, 66.
Separate estate:
 of married woman under 33 & 34 Vict. c. 93., 150.
 of married woman in equity, 150.
 under Acts of 1882 and 1893, 151-153.
Separation:
 agreement between husband and wife to separate, 150.
 when valid, 249.
Shares:
 transfer of, form required, 66, 69, 295.
 in railway company, not an interest in land under 29 Car. II. c. 3. § 4., 74.
 infant shareholder, 132, 133.
 allotment of, is *uberrimae fidei*, 197, 198.
Ship, British:
 transfer of British ship, 66.
 alien cannot acquire property in, 129.
Signature:
 to contract under seal, 59.
 of party charged under 29 Car. II. c. 3. § 4., 79.
Silence:
 does not give consent, 24.
Simple contract, or parol contract:
 always requires consideration, 54, 68, 89.
 when required to be in writing, 67, 68.

Solicitor and client:

a relation which may suggest undue influence, 222.

Specialty: see Contract under seal.

Specific performance: 378-382.

of gratuitous promise under seal, 65, 380.
of infant's promise, 138, 380.

of part-performed contract under 29 Car. II. c. 3. § 4., 81, 82.

of contract made under mistake, 172, 326.

or under misrepresentation, 164, 188, 189.

of contract obtained by fraud, 210.

of sale of goods, 379.

of contracts concerning land, 309, 379.

of contracts for personal service, 381.

general rules, 378-382.

Stakeholder:

liability for money in his hands, 234, 269.

Statute:

Bankruptcy, 46 & 47 Vict. c. 52., 311, 399.
53 & 54 Vict. c. 71., 311, 399.

Bills of Exchange, 45 & 46 Vict. c. 61.
§ 1., 68, 297, 301, 335.

Bills of Lading, 18 & 19 Vict. c. 111., 296, 304.

Common Law Procedure Acts, 15 & 16
Vict. c. 76, and 17 & 18 Vict. c. 125:

as to agreements to refer to arbitration, 245.

as to attesting witnesses, 316.

as to pleading, 438.

Companies, 30 & 31 Vict. c. 131., 200.

Debtors' Act, 32 & 33 Vict. c. 62., 154.

Directors' Liability, 53 & 54 Vict. c. 64.,
200.

Divorce and Matrimonial Causes Act, 20
& 21 Vict. c. 85., 150.

Factors', 52 & 53 Vict. c. 45., 417.

Frauds, Statute of, 29 Car. II. c. 3.,
69-88:

contracts specified in § 4., 69-75.

form required by § 4., 75-80.

effect of non-compliance with § 4.,
80-83.

repeal of § 17., 83 n., 84 n.

§ 17 in United States, 84 n., 83-88.

connexion of documents how to be
shown under § 4., 77, 78, 317.

contracts under § 4., how discharged
by agreement, 341, 342.

Gaming:

16 Car. II. c. 7., 232.

9 Anne c. 14., 233.

7 Geo. II. c. 8., 258.

12 Geo. II. c. 28., 257.

5 & 6 Will. IV. c. 41., 232.

8 & 9 Vict. c. 109., 233, 264.

55 Vict. c. 9., 235, 258.

Infants' Relief, 37 & 38 Vict. c. 62., 124,
134, 137.

Insurance, 19 Geo. II. c. 37.; 14 Geo. III.
c. 48., 238.

Judicature Act, 36 & 37 Vict. c. 66:

as to equitable rights and remedies,
188.

as to right of parties interested in one
action to sue or be sued in name of
one, 285.

as to assignment of contract, 294.

Statute: (ctd.)

as to admission of documents, 316.

as to rectification of documents, 326.

as to provisions regarding time, 329.

as to specific performance of contracts
for sale of land and leases, 382.

as to pleading, 350, 352, 438.

Limitation, Statutes of, 21 Jac. I. c. 16;
3 & 4 Will. IV. c. 42:

as to extinction of remedy, 386, 388.

as to revival of claim, 123, 388.

Lodgers' Protection Act, 34 & 35 Vict. c.
79., 440.

Lord Tenterden's Act, 9 Geo. IV. c. 14:

as to executory contract of sale, 83 n.

as to ratification of infant's contract,
134.

as to acknowledgment of barred debt,
69, 387-8.

Married Women's Contract Acts, 154 n.

Married Women's Property Acts, 151-
155, 305.

Medical Act, 49 & 50 Vict. c. 48., 130.

Mercantile Law Amendment Act, 19 & 20
Vict. c. 97:

as to consideration for guarantee, 73, 79.
as to specific performance of sale of
goods, 382.

as to disabilities to sue in respect of
limitation of action, 387.

as to agent's signature of promise to
pay barred debt, 388.

Promise for benefit of third person,
282 n.

Sale of Goods Act, 56 & 57 Vict. c. 71:

as to requirements for contract of sale,
83-88.

nature of contract, 83.

mistake as to existence of goods, 166.

title to goods obtained by false pre-
tence, 218.

implied conditions, 365-368.

condition and warranty, 372.

specific performance, when granted,
379.

destruction of goods by fault of neither
party, 391 n.

Stock-jobbing, 7 Geo. II. c. 8, Sir J.
Barnard's Act, 236, 258.

30 & 31 Vict. c. 29, Leeman's Act, 259.

Sunday Statutes, 228 n.

Subrogation:

of insurer into rights of insured, 238 n.

Subscriptions:

consideration for charitable, 109 n.

Sunday: 228 n. *See Statutes.*

T.

Telegraph:

contract by, 31 n.

negligence of company, 208 n.

Tender:

a form of performance, 347.

of goods, 347.

of money, 347, 348.

Time:

of the essence of the contract at common
law, 328.

rules of equity as to, 328, 329.

rules of Judicature Act, 329.

lapse of, a form of discharge, 386.

Title:

of assignee of contract, 289-291; *see*
Parties.

Trust:

how distinct from contract, 4, 10, 275, 276.
declaration of, its effect in contract, 284.

U.**Uberrima fides:**

its meaning, 192.
in what contracts required, 192-199.

Ultra vires:

contracts *ultra vires* relate to capacity of
parties, 145.

cannot be ratified, 407.

Uncertainty:

in offer or acceptance, 23.
of consideration avoids promise, 96.

Undue influence: 219-223.

prevents reality of consent, 157.
how distinct from fraud, 219.
when it may be presumed, 220-222.
right to rescind contracts affected by it,
224.

Usage:

evidence of, when admissible, 323, 324.

Usury laws:

promise after their repeal, to repay money
lent at usury, 125.
their place supplied by doctrine of undue
influence, 221.

V.**Void and voidable:**

meaning of the terms, 271, 272.

W.**Wager:** 228-239.

definition of, 228-231.
legislation respecting, 231-239.
in contracts of insurance, 230, 231.

Wager: (ctd.)

in transactions on Stock Exchange, 236,
258.

agreements to pay differences, 236, 237.

money lent to make, 257, 258, 265.

money advanced to pay, 234, 258.

employment to make, 234, 258, 433.

money received in payment of, 234.

money deposited to abide the event of,
234, 269, 270.

securities in payment of, 235, 263.

Waiver:

of rights under negotiable instrument,
promissory note, 104, 105, 335.

of statutory exemption from perform-
ance of contract, 124, 125.

of continuing contract by infant, 132,
133.

as a form of discharge, 333-335.

of executed as distinct from executory
contract, 104, 333, 334.

Warranty: 369-374.

of quality in sale of goods, 115, 168.

when implied, 170, 171.

distinct from condition, 182, 372.

warranty *ex post facto*, 150, 183, 373.

a subsidiary or collateral promise, 369.

in executed contract of sale, 367, 373.

in executory contract of sale, 367-369,
373.

various uses of term, 372 n.

how distinguishable from condition, 371.

of authority, 200, 372 n., 421.

Wrong:

a source of obligation, 8.

included under 'miscarriage' in 29 Car.

II. c. 3. § 4., 72, 73.

infant liable for wrong independent of
contract, 143.

not for wrong arising out of contract,
143.

fraud as a wrong, 176-179, 203, 241.

